

**AND JUSTICE FOR ALL**

**Fulfilling the Promise of  
Access to Civil Justice  
in California**

STATE BAR OF CALIFORNIA

Access to Justice Working Group  
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*Equal justice under law is not a caption on the facade of the Supreme Court building. It is perhaps the most inspiring ideal of our society . . . It is fundamental that justice should be the same, in substance and availability, without regard to economic status.*

*—Justice Lewis Powell, Jr.  
U.S. Supreme Court (Ret.)*

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## Acknowledgments

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On behalf of the Access to Justice Working Group, I wish to thank the many other individuals and organizations who helped make this undertaking possible. Those thanks begin with Harvey Saferstein, who while State Bar of California president displayed the vision to launch this long-range program even though he knew it could not bear fruit during his tenure. Many legal services programs also recognized early on the potential importance of this study and contributed both information and funds which allowed the Working Group to start its research immediately. The Legal Aid Association of California and the LSC Project Directors Association likewise supplied valuable information and assistance, especially at the outset of this project. We also extend special thanks to the van Loben Sels Foundation and to the State Bar of California for their financial support of the Working Group.

During the years we were working on this report, the Working Group has always enjoyed the ongoing support of the State Bar and its Board of Governors. We owe a particular debt to the current State Bar President, James E. Towery, and the current Chair of the Board Committee on Legal Services, Joseph Bell. Both have put enormous thought and effort into seeing the project to its conclusion. We were especially gratified when at its July, 1996 meeting, the Board unanimously accepted the *And Justice For All* report and expressed its appreciation for the Working Group's efforts.

Many individual departments within the State Bar also extended themselves in helping to produce and distribute the report to a wide audience. The Working Group extends special thanks to the Office of Legal Services, and especially its director, Mary Viviano, who personally devoted hundreds of hours to this project, the Executive Offices, the print shop and graphic design department, the mail room, and the Office of Communications. The Legal Services Section also supplied staff support and useful feedback.

During the process of refining the report, the Working Group distributed copies to the public and solicited comments. Many groups responded with thoughtful critiques which led us to make many significant changes in the report. We express special thanks to the Consumer Attorneys of California, the California Women's Law Center, the American Bar Association's Consortium on Legal Services and the Public, the Coalition for Justice, the Legal Services Section Executive Committee, and that section's Standing Committees on Legal Services to the Poor and Crime Victims and Corrections.

Finally, as chair I want to thank the other members of the Working Group. Three years represents a long commitment to any project, no matter how important it may be, especially when the project requires the hours of effort this one did. Those serving on the Working Group were asked to be far more than advisors to the study. They had to spend long hours serving on task forces, personally researching the areas covered in the report, and preparing interim sub-reports which furnished much of the raw material for the final report. Once the

first draft of *And Justice For All* was finally ready, the full Working Group held a series of intensive meetings where we reviewed both the report's substance and its language line by line. The members brought to these tasks a diverse array of knowledge, skills, and perspectives which often led to lively discussions. But they also brought enough humor and good will to the table to insure those debates proved more productive than heated. Seldom have I seen volunteers display such dedication and persistence. I think you will find it shows in the comprehensiveness and quality of the result. But I *know* for certain it made my job as chair an easy one.

Justice Earl Johnson, Jr.  
Chair of the Working Group

**The State Bar of California**  
**Resolution Adopted by the Board of Governors**  
**July 20, 1996**

Upon motion made, seconded, adopted unanimously and consistent with the State Bar of California's longstanding commitment to equal access to the courts and adequate funding for legal services,

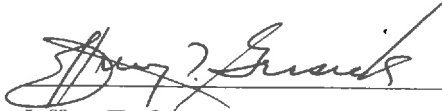
BE IT RESOLVED that the Board of Governors accepts the Access to Justice Working Group's comprehensive report entitled: *And Justice for All: Fulfilling the Promise of Equal Access to Civil Justice in California*, and commends the Working Group for its outstanding efforts;

BE IT FURTHER RESOLVED that the Board of Governors expresses its support in principle for the Access to Justice Working Group report's goal of achieving meaningful access to quality civil justice for all Californians; and it is

FURTHER RESOLVED that the Board approves the continuation of the important process represented by submission of the Working Group report and directs that the Board Committee on Legal Services bring back to the full Board an action plan for implementation.



I hereby certify that the foregoing is a full, true and correct copy of a resolution adopted by the Board of Governors at its meeting held on July 20, 1996, in Los Angeles, California.

  
\_\_\_\_\_  
Jeffrey T. Gersick  
Secretary

Date: 9-20-96

## Preface

*“Some see things as they are and say, ‘Why?’  
I dream of things that never were and say, ‘Why not?’”  
–George Bernard Shaw*

Today, access to justice for poor Californians is at best an unfulfilled promise and at worst a cruel hoax. Yet, nearly 70% of Californians and four out of five Americans erroneously believe that poor people have a guaranteed right to free counsel in civil cases.<sup>1</sup> Nothing could be farther from the truth.

In California and across the nation, only criminal defendants have a right to counsel regardless of their ability to pay. Civil litigants have no such guarantee. Recent studies show that only one-quarter of poor California families with a civil legal problem receive full or partial legal assistance.<sup>2</sup> These statistics do not include the near-poor and people of moderate means who experience serious legal problems but can neither afford to pay for legal assistance nor qualify for free legal services.

While the majority of poor Californians with legal needs who seek assistance will not receive it, many others with serious, even life threatening legal problems will never even seek legal assistance. This is often because they do not know where to find it or because the persistent failure of the justice system to meet their needs has led them to the conclusion that justice is not for all.

The number of people living in poverty in California has increased substantially in the past 20 years. At the same time, income disparities have also grown; the result is that the poor are getting poorer. Social policy has similarly changed with time. Many programs that support people of low incomes, such as child care, food stamps, and other public benefit programs, are being dismantled. Funding has been cut dramatically and new restrictions have been imposed on the grants that are made.

If the number of poor Californians continues to grow as experts predict and as cuts in federal funding for legal services have an impact, the situation will only worsen. The gap between the promise of justice under the law and the reality of the non-existent to meager protection afforded this state’s most vulnerable citizens will widen at an accelerating pace.

The recent 33% cut in federal funding for legal services, resulting in a 38% reduction in federal funds for California, is increasing the severity of the crisis. The recommendations of this report are thus all the more critical to seeking the equal access goal.

It is possible to remain complacent about these statistics until you meet them face-to-face. Katherine, for example, is a 35-year-old single mother who lives in Southern California with her three children, aged five, four and 18 months. Their only income is public assistance. They were evicted from their apartment when her husband left and she could no longer pay the rent and was forced to go on welfare.

After the eviction, Katherine and her children were homeless for nearly three months. They were on the streets during the day and in a shelter at night. She describes the apartment she was finally able to obtain:

The toilet is broken. The oven doesn't work. We have rats and roaches and lead paint peeling off the walls. And, there's no lock on a door that goes out to a fourth floor landing with no railing. The landlord refuses to make these repairs.

Katherine's Medi-Cal benefits were cut off when she could not provide rent receipts because she was withholding rent pending the needed repairs. That means she is unable to obtain health care for her children or herself, although she is a borderline diabetic who should be on medication. She is separated from her abusive husband, but she cannot afford a divorce. Katherine is striving to keep her family together and become self-sufficient, but so far she has received no legal assistance. The local legal clinic is a lengthy bus ride away, and Katherine doesn't think they can help because they turned her away once before when she needed a type of service they could no longer afford to provide.

Finding a way to offer legal assistance to Katherine and the other millions of Californians living at or below 125% of the poverty line is a major challenge. In 1990 this group numbered approximately five million people and experienced almost two million legal problems per year.<sup>3</sup> Helping them is a particularly important challenge because so many laws affecting the poor are changing, effectively eliminating much of the safety net. While the poor experience legal problems at about the same rate as the near-poor and people of moderate means, the legal problems poor Californians face often threaten their very survival. We take issue with those who believe addressing the legal needs of the poor is a challenge too difficult to meet.

America, by many standards still the most advanced of Western nations, stands virtually alone among industrial democracies in its failure to guarantee the civil indigent, either by constitution or statute, the right to counsel in civil cases. For example, this year marks the 500th anniversary of England's enactment of a statutory right to counsel in civil cases—counsel that the government now compensates when the litigant cannot afford to pay.<sup>4</sup> Moreover, most nations back up those rights with financial investments far larger than those the United States currently makes in its legal services programs. Clearly, if so many other countries can do it, so can we.

Just as surely, no single entity can solve the problem. In their role as gatekeepers to the justice system, lawyers have a special responsibility to help ensure that poor citizens gain access to the legal system. The legal profession's acceptance of this special responsibility is evidenced by a steady increase in the amount of pro bono services provided by California lawyers. In 1993 alone, their pro bono contributions exceeded one million hours.<sup>5</sup> However, the staggering amount of need means that lawyers' individual and combined efforts can provide only a modest percentage of the amount required to open the door to justice.

Attorneys are not the only people important to the development of increased access to justice. Adequate functioning of our judicial system is a societal responsibility. Community groups, legal services clients, educators, public sector employees, and many others all need to contribute to designing a delivery system based on the needs of low-income clients and the principle of access to justice for all. A great deal more funding is needed from a variety of sources for such efforts, especially following the recent cuts in federal grants. If funding is not increased, local and statewide initiatives to create a responsive, efficient, and comprehensive delivery system will never be a reality.

In addition, new methods of dispute resolution, which rely less heavily on lawyers yet provide quality justice, must continue to be developed. Where it is consistent with justice, law and the legal process must be simplified and made more easily accessible, benefiting not only those now excluded from access to the present system but all others as well. For such sweeping changes to be implemented, we must first acknowledge that access to justice for all Californians is a fundamental, indeed essential, right. The fulfillment of this right requires the earnest commitment and ongoing attention of a broad spectrum of leaders in this state's public and private sectors.

Our goal is threefold:

- (1) to ensure the right to civil justice for all Californians;
- (2) to foster systemic improvements in the state's civil justice system that will expand access to the system for all Californians; and
- (3) to develop adequate funding to provide meaningful access to quality justice for low- and moderate-income people when they need it.

This report is offered as a road map to guide us on the first stage of what we recognize to be a long and arduous journey. While the terrain is steep and many of the roads are as yet untraveled, we remain committed to the proposition that when the destination is of such crucial importance, we will find our way.

***“...[T]he civil justice system of the United States is fundamentally disconnected from the lives of millions of Americans. It must do more to address the personal legal needs of the American people if the nation is to make good on its commitment to equal justice.”***

*–American Bar Association,*

*Agenda for Access: The American People and Civil Justice (1996)*

## Mission and Goals

*“Helplessness does not stem from the absence of theoretical rights.  
It can stem from an inability to assert real rights.”  
—Robert F. Kennedy, 1964, U.S. Attorney General*

Recent legal needs studies have quantified the wide gap between the ideal of equal justice for all and the reality of no justice for many in California and the rest of the nation. Studies by the American Bar Association and bar associations in at least 15 states demonstrate that approximately three out of four poor people who have a legal problem will not receive legal assistance.

In March 1993, the State Bar of California appointed the Access to Justice Working Group and charged it with the task of developing a long-term, interdisciplinary approach to achieving equal access to justice in California.

Members of the Working Group included private bar leaders, legal services lawyers, pro bono coordinators, alternative dispute resolution experts, law professors, social scientists, and representatives of the judiciary. It was chaired by Justice Earl Johnson, Jr. of the California Court of Appeal, a former director of the OEO Legal Services Program and former professor of law at the University of Southern California.

Topics covered by this long-range plan include:

- assessing the central importance of equal access to justice to an ordered society;
- examining how California compares with similar democracies, many of which already guarantee and fund equal access to justice to low-income citizens as a matter of right;
- estimating the extent of the gap between need and availability of equal access to justice and the cost of closing the gap;
- looking at various methods of achieving equal access to justice, including providing more legal services, encouraging alternative means of dispute resolution, redefining the role of the lawyer in the provision of legal services, and simplifying certain laws and legal procedures;
- identifying and appraising potential sources of funding for programs designed to achieve equal access to justice;
- looking at ways to involve members of all segments of society in working toward the equal access goal; and
- developing an initial plan for a structure for the California Commission on Access to Justice, which will become a working entity and the basis for assessing and implementing ideas en route to the ultimate goal.

During the past three years, the Access to Justice Working Group held 15 meetings to review information, make policy decisions, and set priorities. Individual members did considerable research and prepared initial drafts of various sections of the report. The Working Group also retained a lead consultant to perform additional research, consolidate their individual work into an initial draft, and work with the committee to edit the document into a final draft.

With the approval of the Board Committee on Legal Services, the Working Group circulated an initial draft report for public comment. Valuable critiques were received, and these thoughts were incorporated into the final product.

One of the primary purposes of the report is to increase awareness and discussion of access to justice issues inside and outside of the legal community, particularly among leaders of the state's private and public sectors. It contains a series of options that merit serious consideration, refinement, and prioritization as the Commission on Access to Justice carries on the work begun by the Access to Justice Working Group.

Our ultimate goal is to broaden support for access to justice issues inside and outside the legal community and make an ordered transition from the Working Group to an ongoing California Commission on Access to Justice.



## Executive Summary

*“The first duty of society is justice.”*

*–Alexander Hamilton*

Access to justice is a fundamental and essential right in a democratic society. It is the responsibility of government to ensure that all of its people enjoy this right – that there is indeed “justice for all.”

### **Access to Justice Requires Lawyers; Many Nations Provide Counsel as a Matter of Right**

In most parts of our civil justice system, access to justice requires that lawyers represent both parties. As a practical matter, in most cases there can be no access to justice without access to adequate legal representation. Thus, justice is endangered unless those who cannot afford counsel are provided lawyers. This is particularly true when one side, often a corporation or government agency, is represented by counsel.

The absence of representation also has a negative effect on the functioning of the judicial system. Courts must cope with the need to provide guidance and assistance to proper parties to ensure a fair trial or hearing. Such efforts, however, are a burden on both the court’s time and personnel.

[The contingent fee system plays a separate but important role in the existing legal system. Such cases offer another avenue to improve access to justice as their focus on significant monetary recoveries allows poor and moderate-income plaintiffs to pay attorneys fees only if there is an award. Clients pay their attorney an amount proportional to the level of damages awarded. This report, however, focuses on access to legal services in cases that are not appropriate for contingent fee representation: those where damages are normally not of paramount importance.]

The governments of many industrial democracies other than the U.S. already guarantee low-income people the assistance of free lawyers in civil cases either as a statutory or constitutional right. A few of these countries, for example Italy and Spain, implement this right through mandatory pro bono programs requiring lawyers to supply representation without compensation. But the majority – England, France, Germany, the Netherlands, the Scandinavian countries, and Canadian provinces – fund civil legal services for the poor by providing lawyers, at state expense, to those who would otherwise go unrepresented.

### **Legal Needs of Three Out of Four Poor Californians Are Not Being Met**

The need for civil legal assistance among low-income Californians far exceeds the current level of resources provided through government and private charity. Today, the legal needs of approximately three-quarters of all poor people are not being met at all. The legal needs of the other one-quarter are sometimes being met only partially and the number of poor people in California continues to increase at a pace faster than that of the state’s overall population.

The lives of California’s poor are highly regulated, giving rise to the need for legal assistance. The legal needs of the poor fall primarily into the areas of housing, food, health,

family, employment, education, consumer finance, and individual rights. Those Californians who often need legal representation on matters that may be critical to their very survival include battered women, children, youth, the disabled, the elderly, farmworkers, the homeless, minorities, single parents, the unemployed, and victims of crime.

### **Legal Services Programs Promote Peaceful Dispute Resolution and Efficiently Serve Millions of Poor Clients**

Since California's first legal aid office opened its doors in San Francisco in 1916, legal services programs have promoted an ordered society and the peaceful resolution of disputes. At the same time, they have provided direct legal assistance to millions of this state's poor. Equally important, legal services programs have promoted confidence in low-income people that our system of laws can work for them.

Many of the services provided to legal services clients actually result in a savings to local and state government entities. When a woman receives adequate child care payments and is able to stay off welfare, when an illegal eviction is stopped and a family is able to avoid homelessness, when a disabled couple can live independently with in-home support rather than be institutionalized, not only is critical help provided to the poor client, but taxpayers save money as well.

In addition, legal services offices try to begin to help people on public assistance find a way to enter the mainstream of working America. For example, some offices have recently put programs in place to assist poor people to set up their own businesses and to redevelop neighborhood housing using a nationwide network of business lawyers.

In the best of times, California's legal services lawyers were too few to meet more than a fraction of the need for their services. Now California's 114 legal services programs are forced to make do with fewer and fewer resources at the same time that more and more Californians are falling into poverty. In 1996, there are 130 fewer legal services attorneys and over two million more poor people in the state than there were in 1980. There are now only 500 legal services lawyers to serve almost six million poor people. This means there is one attorney for every 11,000 poor people in a state where there is approximately one lawyer for every 300 people in the rest of the population.<sup>6</sup>

After the 1994 national elections, the makeup of Congress changed dramatically. Congressional concern about the rising deficit and alleged abuses by legal services programs, combined with fundamental attacks on the concept of legal services for the poor, resulted in much debate and uncertainty. The ultimate outcome was diminished funding for legal services coupled with significant restrictions on the work that could be done by federally funded programs.

The FY 1996 appropriation for the Legal Services Corporation decreased 33% from the year before, resulting in a net loss of 38% of LSC money in California. Many new restrictions were proposed, including bans on class actions, court awarded attorneys fees, and welfare reform advocacy, restrictions on legislative representation, and the extension of the LSC restrictions to all other funds of a program, and many other requirements and prohibitions.

Legal services programs are undertaking a comprehensive planning process, working with the private bar, clients, and others. Despite cutbacks in staff and services, legal services programs are dedicated and creative in making the best use of their extremely limited resources. However, greater efficiency and an infusion of pro bono services have not come anywhere near closing the gap between need and service.

### **Funding for Legal Services Must Be Increased Dramatically**

Funding for civil legal services must be increased dramatically in order to implement a right to justice for low-income Californians. The Access to Justice Working Group's best estimate is that it will require an additional \$250 to \$300 million (in 1993 dollars) to fill the

gap between the 1993 level of funding (about \$100 million) and the amount required to provide justice to almost six million poor people currently living in California.

Experience in the U.S. and other countries demonstrates that the private bar, acting on its own, cannot and should not be called upon to provide full representation for California's civil indigent. California lawyers already provide more than one million hours of pro bono service each year. At the same time, more California lawyers – acting individually and collectively – can and should provide additional pro bono services and/or financial contributions to legal services programs on an ongoing basis.

One group of attorneys who might be able to perform significantly more pro bono work could be those who are currently unemployed or underemployed. Encouraging volunteer work by these attorneys, many of whom are young, could benefit both the lawyers, who would gain legal experience, and poor clients, who would get free representation. It would not be realistic to encourage pro bono work from all unemployed or underemployed attorneys, but coordination with the California Young Lawyers Association could prove fruitful.

In 1993, the state's 121 legal services programs reported to the State Bar of California that they had received approximately \$100 million in total funding that year, with the federal Legal Services Corporation being the single largest funding source. (The number of legal services programs in the state has since declined to 114.)

More recently, federal funding has been reduced dramatically. California's 1996 share of the Congressional appropriation was \$28.2 million, down from the 1995 level of \$45.3 million. This was a 38% decrease, without accounting for inflation.

The State Bar's Legal Services Trust Fund Program was the second largest funding source in 1993. The Trust Fund was established by a 1981 California statute requiring California lawyers who hold client funds which are either small in amount or held for a short period of time to place them in an interest-bearing account. Banks forward the interest earned to the State Bar, which in turn distributes the funds through the Trust Fund Program to qualifying non-profit legal services programs. Similar programs are now functioning in all 50 states.

With the decline in interest rates, Trust Fund Program revenues plummeted nearly 75% in recent years, to a low of \$5.7 million in 1994–1995, although they did increase slightly in 1995–1996. As a result, the Trust Fund was able to distribute approximately \$6.6 million to qualifying programs that year.

Other funding sources for legal services programs included foundations, the United Way, contributions (from bar associations, individual lawyers, fundraising events, etc.) court-awarded fees, and miscellaneous funding.

### **Near-Poor and Moderate-Income Californians Also Require Increased Access to Civil Legal Services**

While almost two million California households (representing around five million people) lived below 125% of the poverty line in 1990, another 2.2 million households (representing over six million people) lived just above this level, struggling to maintain a minimum standard of living. Many of these families are unable to afford legal services for pressing needs without some form of legal assistance. And, those who try to represent themselves are very likely to lose, even when the evidence indicates they should prevail.

As funding for legal services in California increases as a result of future efforts of the Commission on Access to Justice recommended by this report, consideration must be given to establishing some level of subsidized legal services or other means to increase meaningful access to justice for the near-poor. Steps to assist them must be taken even before the needs of the poor are completely satisfied.

Another two and one-half million California households (representing almost seven million people) comprise the middle fifth of the state's population, with annual household incomes of more than \$27,500 but less than \$45,000. While these middle-income people are able to obtain legal assistance more often than the poor and near-poor, they still are unable to afford representation in many instances. This may result in harm and injustice to these families of moderate means. New legal services delivery models and financing arrangements must be developed, tested, and evaluated, with the goal of making quality legal services more widely available to middle-income people in this state.

### **Innovative Delivery Methods Must Be Developed and Expanded, in addition to New Funding Sources**

Increased funding for legal representation is the most important but not the only approach to giving low-income Californians access to justice. There are also some promising possibilities for developing less traditional delivery methods to address certain legal problems. Some of these options would not require lawyers, yet they would still provide quality justice for poor, near-poor, and middle-income people. It may also be possible to simplify substantive law in certain areas so that lawyers are not needed for some problems for which they are now essential.

Innovative delivery methods that are being developed or that should be expanded include prepaid legal services, court-affiliated alternate dispute resolution, independent alternative forums, carefully supervised use of paraprofessionals, small claims courts, peer counseling, and unbundled legal services. Others, such as pro per coaching, could be explored as interim measures.

At the same time, it is critical that society ensures that these measures actually deliver on their promises and do not deny justice to the unrepresented. This will require the creation of a mechanism capable of designing, establishing, and evaluating experimental programs for their impact on access to quality justice on an ongoing basis.

Achieving access to justice as a matter of right will require the honest commitment and ongoing attention not just of lawyers, but also of a broad spectrum of California's public and private sector leaders. The legal profession should provide initial leadership by calling attention to the magnitude and seriousness of the problems and by building the coalition necessary to address the issue. However, lawyers are but co-equal members of the diverse team of leaders who must work together to meet the challenge of providing "equal justice under law."

### **Findings of the Access to Justice Working Group**

The report makes twelve findings that form the basis for the recommendations and funding options that follow. The findings reflect the fact that adequate civil representation remains an unfulfilled promise for the vast majority of poor and near-poor Californians, as well as for many moderate-income citizens, and that legal representation is the basis for access to justice. The findings state that this lack of counsel, which is a societal concern, seriously burdens the justice system. They also note the importance of delivery methods such as pro bono work, alternative dispute resolution mechanisms, and law simplification to the goal of increasing access to justice.

### **Recommendations Regarding the Delivery of Legal Services**

The report offers thirteen recommendations for consideration by leaders in both the public and private sectors. Paramount is the recommendation that it should be the state government's legal obligation to ensure all Californians receive access to justice. Increased funding should be provided to the poor for legal representation in civil cases, beginning with matters in which basic human needs are involved. The state should also improve access to legal services to near-poor Californians who often find themselves without representation even in the most pressing circumstances.

The report recommends the creation of a California Commission on Access to Justice to provide ongoing leadership, to explore new sources of funding, and to oversee efforts to increase funding and improve delivery methods. The Commission would include members appointed by the State Bar, the judiciary, and business and community organizations.

The report recommends that new methods be developed to deliver quality legal services at affordable prices to larger numbers of moderate-income Californians. This includes exploring the feasibility of a statewide prepaid legal insurance plan available to all Californians and continuing efforts to develop alternative methods of dispute resolution that increase access without decreasing the quality of justice.

In other areas, the report encourages the development of promising approaches to simplifying the law and the evaluation of their impact on access to justice. This might lead to expanded use of supervised paraprofessionals where the result is increased access to justice and no diminution in the quality of services provided.

The report recommends the study, development, and improvement of programs that assist litigants in representing themselves in court proceedings until adequate legal representation can be provided to all who need it. It encourages the development of programs designed to make courts more “user friendly” to low- and moderate-income individuals.

For example, Small Claims Court should be modified to become even more effective in providing increased access to low- and moderate-income clients. In all cases, the report emphasizes the need to carefully evaluate the results of any proposed initiatives.

Finally, the report recommends the development of effective public education programs on understanding legal rights and responsibilities and finding affordable legal assistance. These efforts should target low- and moderate-income people, taking care not to raise expectations that cannot be fulfilled at current funding levels.

### **First-Priority Options to Obtain Necessary Funding**

In order to obtain the funding necessary to achieve its recommendations, the Working Group identified five priority “options” which, in some combination, could result in the requisite funding.

As its top priority, the report urges the federal government to affirm its responsibility for maintaining independent legal services programs throughout the country and to increase the national Legal Services Corporation appropriation significantly as soon as possible. State government should also recognize that lawyers are as essential to justice as courts and, therefore, the state should fund lawyers out of general fund revenues for people who cannot afford representation.

The report urges California lawyers to continue to increase the substantial pro bono efforts they are already making with strong support from the organized bar. Additional “priority options” include considering ways to increase litigation-related fees to support increased access to justice and exploring the feasibility of imposing a tax on the value of legal work performed that could generate significant revenue to expand access to justice.

### **Second-Priority Options Regarding Funding**

The report discusses ten “second-priority options” that could enhance legal services funding. Although the options in this category would not yield the high level of funding needed to achieve the Working Group’s goals, they are nevertheless potentially valuable sources of supplemental financial support.

These options include dedicating a portion of punitive damage awards to increasing access to justice and diverting class action residuals to support increased access to civil legal services for the indigent. The report also suggests directing interest on real estate escrow accounts to expand access in civil matters, possibly targeting resulting funds to legal services housing work and other affordable housing groups. It is additionally important to continue

efforts to increase the net yield on the Legal Services Trust Fund. Other options involve increasing government contracts with legal services organizations to provide services to low-income clients and exploring revenues to be generated from litigation-based fees.

The report advocates efforts to broaden pro bono opportunities for currently under-represented groups of legal advocates. For example, the participation in public interest work of more law students and other non-lawyer legal paraprofessionals should be encouraged and facilitated. Currently underemployed attorneys (recent graduates or people in transition) might also be a good source for increased pro bono work. Efforts should additionally be made to increase the quantity and quality of advice provided through Lawyer Referral Services to low- and moderate-income clients.

A final option recognizes the need to expand efforts to increase philanthropic giving to provide legal services to low-income people.

### **In Conclusion**

Over the past three years, the Access to Justice Working Group has examined the relationship between poverty and justice for all in California. Their findings are clear: the civil legal services available to the poor and near poor are wholly inadequate to meet the need.

No single entity can solve this problem. There must be a sustained, coordinated effort among leaders in the public and private sectors. Legal services programs, local bar associations, and client groups are contributing through coordination and regional and statewide planning, but much more is needed. Greatly increased funding must be devoted to the provision of legal services for the millions of Californians who are currently denied access to justice. This denial all too frequently means they also lack adequate food, safe housing, basic medical care, fair employment, and other necessities of life.

Ultimately, the majority of the necessary funding must come from the Californian people themselves, through the tax dollars which represent our commitment to our democratic system of government and to a better future in which the historic promise of “justice for all” is at last fulfilled.

# Summary of Findings, Recommendations, and Options Regarding Funding

## Findings

### **Finding 1. Fundamental Right**

Access to justice is a fundamental and essential right in a democratic society.

### **Finding 2. Importance of Legal Representation**

Access to justice in most parts of our civil system requires access to lawyers.

### **Finding 3. Counsel as Necessary as Courts**

Since lawyers are as essential as judges and courts for citizens to gain access to justice in civil cases, government has just as great a responsibility to ensure adequate counsel is provided to all as it does to supply judges and courthouses in those cases.

### **Finding 4. Counsel Guaranteed in Other Countries**

The governments of most industrial democracies have established a legal right to free assistance of lawyers in civil cases for low-income citizens.

### **Finding 5. Higher Contributions in Other Countries**

The governments of many industrialized democracies fund legal representation for low-income citizens in civil cases at a much higher level than does the United States or California.

### **Finding 6. Unmet Legal Needs of the Poor**

The need for civil legal assistance among low-income Californians far exceeds the current level of public and charitable funding; an additional \$250 to \$300 million (in 1993 dollars) in funding is necessary to meet the legal needs of California's poor.

### **Finding 7. Subsidized Services for the Near-Poor**

The near-poor population in California also has significant unmet legal needs which must be addressed through partially subsidized legal services even before the needs of the poor are completely satisfied.

### **Finding 8. Assistance for the Moderate-Income**

Innovative methods of financing and delivering affordable legal services to moderate-income Californians should be developed, tested, and evaluated.

### **Finding 9. Pro Bono**

California lawyers perform a substantial amount of pro bono work and it is reasonable to expect more lawyers to provide representation or financial contributions to legal services programs in the future; nonetheless, the private bar alone cannot approach meeting all the unmet legal needs of the poor.

**Finding 10. ADR and Law Simplification**

Innovative methods of dispute resolution and simplification of substantive law may provide poor, near-poor, and moderate-income Californians access to quality justice in selected areas without always requiring the assistance of an attorney.

**Finding 11. Burden on the Justice System**

A lack of representation not only disadvantages litigants, but it also burdens the justice system itself. More fundamentally, it detracts from public confidence in the justice system when the financial situation of a party is more likely than the merits of an issue to determine the outcome.

**Finding 12. Societal Obligation**

Achieving access to civil justice as a matter of right will require the commitment and ongoing attention not only of the legal profession, but also of public and private sector leaders.

**Recommendations**

**Recommendation 1. State Obligation**

Establish the state government's legal obligation either in the state Constitution or by statute to ensure all Californians receive access to justice.

**Recommendation 2. Commission**

Create the California Commission on Access to Justice to provide ongoing leadership and oversee efforts to increase funding and improve delivery methods.

**Recommendation 3. Civil Representation for the Poor**

Increase funding to guarantee the poor appropriate representation in civil cases, beginning with matters in which basic human needs are at issue.

**Recommendation 4. Access for the Near-Poor**

Improve access to legal services for California's near-poor residents who often find themselves without representation even in the most pressing circumstances.

**Recommendation 5. Innovative Delivery Methods**

Develop innovative methods to deliver quality legal services at affordable prices to more of California's moderate-income residents, ultimately benefitting all Californians.

**Recommendation 6. Prepaid Legal Services**

Explore the feasibility of a statewide prepaid legal insurance plan to help make legal representation available to all Californians.

**Recommendation 7. Alternative Dispute Resolution**

Continue to develop alternative methods of dispute resolution that increase access without decreasing the quality of justice.

**Recommendation 8. Law Simplification**

Continue to develop promising approaches to simplifying the law and evaluate their impact on access to justice.



**Recommendation 9. Supervised Paraprofessionals**

Expand the use of supervised paraprofessionals in cases where such use results in increased access to justice without decreasing the quality of justice.

**Recommendation 10. Pro Per Assistance**

Recognizing they can never provide equal access to justice, as an interim measure, programs that assist litigants in representing themselves in court proceedings should be studied, developed, and improved until adequate legal representation can be provided to all who need it.

**Recommendation 11. User-Friendly Courts**

Encourage the development and evaluate the results of programs designed to make courts “user-friendly” to low- and moderate-income individuals.

**Recommendation 12. Small Claims Court**

Improve Small Claims Courts to make them as effective as possible in providing increased access to justice to low- and moderate-income clients.

**Recommendation 13. Public Education**

Expand public education programs on understanding legal rights and responsibilities and on finding affordable legal assistance that are targeted to low- and moderate-income people, taking care not to raise expectations that cannot be fulfilled at current funding levels.

**Options Regarding Funding**

Fifteen options for increasing funding for civil legal services in California follow. These are not presented as recommendations of the Access to Justice Working Group, but as possibilities to pursue to create new methods of funding in the future. They are presented as alternatives and are meant to be considered independently from one another. Some may work in concert, while others may work better on their own.

**First-Priority Options**

These first five options have the potential to yield substantial amounts of additional funding for access to justice.

**Option 1. Federal Responsibility**

Pursue ways to reaffirm federal responsibility for maintaining independent legal services programs throughout the country and increase the national Legal Services Corporation appropriation significantly as soon as possible, rather than reduce or eliminate it altogether.

**Option 2. State Responsibility**

Recognizing that lawyers are as essential to justice as courts are, explore having the state government pay for legal representation out of general revenues for those who cannot afford it.

**Option 3. Pro Bono Efforts**

Develop ways to ensure that California lawyers continue to increase the substantial pro bono efforts they are already making with strong support from the organized bar.

**Option 4. Litigation-Related Fees**

Consider ways to increase litigation-related fees to support increased access to justice.

**Option 5. Tax on Value of Legal Work**

Explore the feasibility of imposing a tax on the value of work performed by attorneys, private judges, and other legal professionals that would generate significant revenue to expand access to civil justice.

**Second-Priority Options**

These ten options should be considered on a lower-priority basis than the five options above as these could generate smaller amounts of supplementary funding for civil legal services.

**Option 6. Punitive Damages**

Dedicate a portion of punitive damage awards to increasing access to justice.

**Option 7. Class Action Residuals**

Divert class action residuals to support increased access to civil legal services for the indigent.

**Option 8. Real Estate Escrow**

Direct interest on real estate escrow accounts to expand access to justice in civil matters.

**Option 9. Government Contracts**

Increase government contracts with legal services organizations to provide services to low-income clients.

**Option 10. Other Litigation-Based Fees**

Explore revenues to be generated from other litigation-based fees.

**Option 11. Pro Bono Outreach**

Broaden pro bono opportunities to involve currently under-represented groups of lawyers in making a significant contribution.

**Option 12. Law Students**

Encourage and facilitate the participation of more law students and legal paraprofessionals in public interest work.

**Option 13. Increase Trust Fund Yield**

Continue efforts to increase the net yield on the Legal Services Trust Fund.

**Option 14. Lawyer Referral Services**

Increase the quantity and quality of advice Lawyer Referral Services provide to low- and moderate-income clients.

**Option 15. Philanthropic Giving**

Continue and expand efforts to increase philanthropic giving to fund legal services for low-income people.

# **AND JUSTICE FOR ALL**

## **PART ONE**

History, International Comparisons,  
Delivery Systems,  
Legal Needs, and Estimated Costs



# 1.

## Society's Obligation to Guarantee Justice to Those Unable to Afford Counsel

Carved deeply in stone above the entrance to the United States Supreme Court is one of the highest ideals of our political system: "Equal Justice Under Law." This aspiration is based on two principles. One is that the substantive protections and obligations of the law shall be enacted, interpreted, and applied to treat everyone equally – no matter how high or low their station in life.

The second principle involves access to the legal system. Even if we have fair laws and an unbiased judiciary to apply them, true equality before the law will be thwarted if people cannot invoke the laws for their protection. In short, for such persons without access, our system provides no justice at all, a situation far worse than one in which the laws favor some and disfavor others.

### Access to Justice as an Essential Right in a Democratic Society

The goal of equal access to justice is deeply entrenched in Western civilization, with roots in the 2,000-year-old laws of the Roman republic.<sup>7</sup> In 1215, the goal was reflected in the core document of Anglo-Saxon jurisprudence, the Magna Carta: "To none will we sell, to no one will we refuse or delay, right or justice."

In the 17th and 18th centuries, access to justice was part of the "social contract" theory so influential with the founding fathers of our country. This idea held that citizens would not surrender their right to decide disputes through force unless the sovereign offered a forum which gave all, rich and poor alike, an equal chance of prevailing, if they were in the right.<sup>8</sup>

### England and the European Continent

Five hundred years ago, during the reign of Henry VII, the English Parliament made access to justice specific in a statute that required the courts to appoint counsel for poor people in civil matters, although without pay. In 1883, England amended this statute and began compensating appointed counsel.<sup>9</sup>

France granted its people the right to counsel in civil cases in 1851<sup>10</sup> and Germany enacted statutes giving similar rights in 1877.<sup>11</sup> The Scandinavian countries and the rest of Northern Europe did so in the early 20th Century.<sup>12</sup> Italy, Spain, Austria, Greece, and other European nations have likewise created such rights.<sup>13</sup> In 1937, Switzerland's Supreme Court held that poor people could not be "equal before the law" unless they had lawyers like the rest of the citizenry.<sup>14</sup> Several Canadian provinces, Australia, New Zealand, Hong Kong, and many other members of the British Commonwealth created and funded a comprehensive right to counsel in civil cases in the 1960s and 1970s.<sup>15</sup>

For most European countries, those statutory rights are now backed by the international "constitutional" right to counsel declared by the European Court of Human Rights in 1979. In the case of *Airey v. Ireland*,<sup>16</sup> an indigent Irish woman complained she had been denied a lawyer to litigate her judicial separation case.

*"To no one will we sell, to no one will we refuse or delay, right or justice."*

*–Magna Carta, 1215*

The European Convention on Human Rights (the European version of our Bill of Rights) contains a clause, akin to our “due process clause,” requiring that civil litigants must be given a “fair hearing.” In *Airey*, the court determined poor people could not have a fair hearing in a civil case in the regular courts unless represented by a lawyer.

Thus, the court held, the “fair hearing” requirement mandated that Ireland and other member nations supply free lawyers to poor people in civil litigation conducted in the regular courts. European governments can avoid this obligation to provide free lawyers to the poor only in disputes which can be resolved in simplified forums where lawyers are unnecessary to a “fair hearing.”

In many industrial democracies, governments have recognized their responsibility to supply lawyers for people who cannot afford them is as great as their responsibility to provide the judges who resolve disputes. For many citizens, justice is as impossible without one as without the other. Thus, both are essential elements of a fair justice system.

### **United States and California**

The Roman and English common law concept of equal justice came to America with the colonists. It is expressed in certain provisions of the U.S. Constitution<sup>17</sup> and in most state constitutions, including that of California. The preamble to the federal Constitution says “to establish justice” is one of the new nation’s four primary goals. More specifically, the due process clause guarantees no one shall be deprived of liberty or property, as well as life, unless he or she is given “due process of law.” The Fourteenth Amendment adds a further guarantee that every American shall have “equal protection of the laws.”

Surely, this constitutional language offers the promise of access to justice for *all* Americans – rich and poor. Most American courts, however, have persisted in a narrow reading of the “due process” and “equal protection” clauses, equating access to justice only with the right to be physically present in the courtroom, with or without a lawyer.<sup>18</sup> For example, in 1976 the California Supreme Court held in *Payne v. Superior Court* that free counsel must be provided for indigent prisoners involved in civil litigation primarily because they cannot personally do their own research, investigation, and presentation in the courts.

In more than 200 years, only a few American courts have recognized that the Constitution compels appointment of free counsel for poor people in civil cases. When they have done so, it has only been under very limited circumstances. For example, in 1979 the California Supreme Court held in *Salas v. Cortez* that due process requires free counsel for indigent fathers in civil paternity actions. The Oregon Supreme Court, acting in *State v. Jamison* in 1966, provided a right to free counsel for indigent parents in cases terminating parental rights.

Some states have used England’s 1495 “Statute of Henry VII” as the legal basis for waiving court fees and costs for indigent civil litigants. The California Supreme Court did so in 1919 in *Martin v. Superior Court*.<sup>19</sup> However, no court as yet has construed the statute to provide free counsel for those same litigants. Nonetheless, the existence of this right for 500 years in England, the source of our common law heritage, underscores the claim that access to legal representation is, or should be, a matter of right in the United States.

Interestingly, many Americans appear to have a view of our constitutional protections that is consistent with the European Court of Human Rights’ interpretation of that continent’s “fair hearing” requirement. When asked whether poor people in this country already have a right to free counsel in civil cases, 70% of Californians and 75% of Americans responded, “Yes, they do.”<sup>20</sup> This currently

mistaken belief may demonstrate an understanding of the essential connection between equal justice and democracy that is more complete than the one demonstrated by courts.

### **Funding Access**

A few European nations (like Italy and Spain) still conscript lawyers for involuntary pro bono appointment, making them provide representation without compensation. However, most nations pay such lawyers with government funds.<sup>21</sup> Indeed, many countries invest far more in providing legal services to the civil indigent than the United States and California do.

For example, England spends more than *eight* times as much per capita as the U.S. (There is a movement in England today to reduce funding for civil legal services. Even if such a change occurred, however, their level of funding would still be seven times greater than that of the U.S.) Ontario spends more than six times as much, the Netherlands five times more than the U.S., and Sweden and Quebec about four times our level. Even France and Germany, whose courts rely on active judicial inquiry more than adversarial presentations by lawyers, spend more than twice as much as the U.S. on civil representation for the poor.<sup>22</sup>

It should be noted that England's financial commitment is even more dramatic when national income is brought into the comparison. The English invest eight times more per capita, but nearly twelve times more of the nation's gross domestic product, on civil legal services than the United States.<sup>23</sup>

Even more startling figures emerge when we compare federal, state, and local government expenditures on legal services for the indigent in California with those of European democracies. For example, as of 1990, England spent just over *ten* times as much per capita as California. Ontario spent more than seven times as much, the Netherlands more than five and one-half times as much, and Sweden and Quebec almost five times as much.<sup>24</sup> (These comparisons are illustrated in Table 1.)

Estimates of what California would have to invest annually in civil legal services to match the level of funding these nations now provide range from a low of \$135 million to match France and Germany to a high of \$456 million to provide funding at the level of England and Wales.<sup>25</sup> To match the average investment of these nations, California's annual investment would have to increase to \$248 million.

Two additional comparisons are useful in understanding the extreme limits California has placed on its commitment to equal access to justice. Californians pay about \$16 billion a year in private fees for lawyers, primarily for civil matters.<sup>26</sup> In contrast, only \$100 million was raised for civil representation for the indigent in California from all private and public sources in 1993.<sup>27</sup> In short, Californians spend \$160 on private legal fees for every \$1 spent on legal services for the poor, who comprise almost 20% of the population.<sup>28</sup>

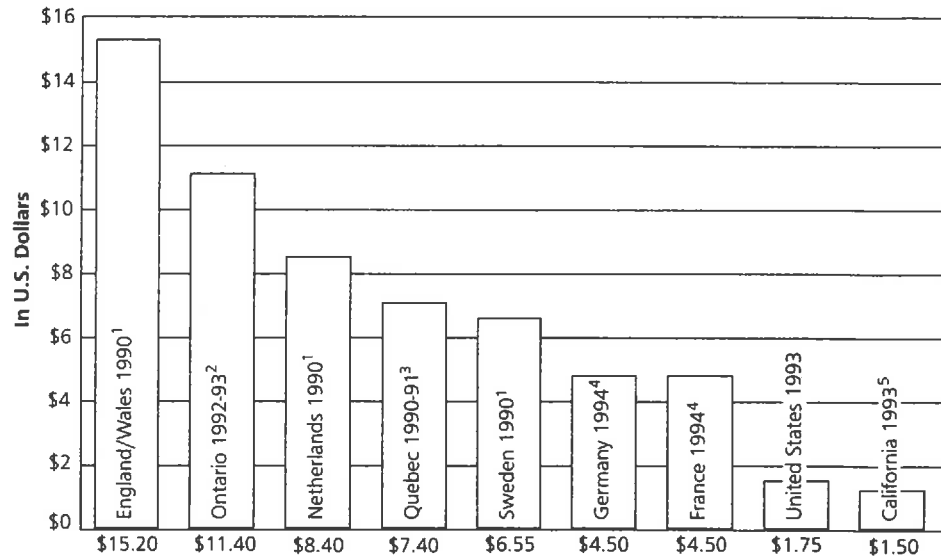
To take this comparison one step further, government expenditures to provide poor people with counsel in this state total six-tenths of one per cent of California's total public-private expenditures for lawyers in civil cases.<sup>29</sup> In England, the government's civil legal aid budget represents more than ten per cent of that nation's total public-private expenditures on lawyers.<sup>30</sup>

Another important measure of the investment in civil legal services is a comparison of the size of that investment with the budget for the whole justice system. In England, for example, the budget for providing civil legal services to lower income people is nearly as large as the judiciary's budget. In California,

combined federal and state expenditures on civil legal services comprise only six per cent of the budget for the state's judiciary.<sup>31</sup>

The bottom line? By any measure, both the United States and California have failed to deliver on the promise of equal justice before the law for over 200 years.

**Table 1. Per Capita Government Investment in Civil Legal Services.**



1. Legal services budget data for England, Sweden, and the Netherlands are from Jeremy Cooper, *English Legal Services: A Tale of Diminishing Returns*, 5 MD. J. CONTEMP. LEGAL ISSUES 24 (1994). Cooper's figures were derived from a study conducted by the French Conseil d'Etat in 1990. Population figures for England, Sweden, and the Netherlands are from BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1993, Table No. 1374 (113th ed. 1993) [hereinafter U.S. CENSUS].

2. Data for Ontario (for the 1992-93 fiscal year) are from Robert Holden, *Civil Legal Services System Description* (1993) (unpublished manuscript, on file with Justice Earl Johnson, California Court of Appeal). Population figures for Ontario are from THE WORLD ALMANAC AND BOOK OF FACTS 1994 749 (1993).

3. Quebec data were obtained from the 1990-91 Annual Report of the Quebec Province Legal Aid Program. Population figures for Quebec are from THE WORLD ALMANAC AND BOOK OF FACTS 1994 749 (1993).

4. The 1994 projected figures for France and Germany were derived from National Resource Center for Consumers of Legal Services, *France Beefs up Legal Aid*, LEGAL PLAN LETTER, Jan. 15, 1993. Population figures for France and Germany are taken from U.S. CENSUS, *supra*.

5. The 1993 figure for California was derived by adding the U.S. \$34.9 million provided by the Legal Services Corporation and the U.S. \$10.3 million provided through other government funding (federal, state, and local). Population figures for California are taken from U.S. CENSUS, *supra*.



# 2.

## History of Legal Services in the U.S. and California

### United States History

Individual private attorneys who were willing to represent low-income clients as volunteers or at reduced fees provided the earliest form of civil legal assistance in the U.S. They undertook this no-fee or low-fee work as a charitable contribution. Their services came to be called *pro bono* from the concept of “*pro bono publico*,” for the public good.

In the late 19th century, some lawyers and bar associations began to create more organized efforts to represent poor clients as an alternative or supplement to the obligations of individual lawyers. The first legal aid society was established in 1876 by the German Society of New York City, whose members wanted to save the latest wave of German immigrants from victimization.<sup>32</sup> Within a few years its focus and support broadened, and the German Legal Aid Society became the New York Legal Aid Society. Thus was born the era of the privately-funded legal aid program.

Following this example, small legal aid programs began to appear in metropolitan areas across the country. These early programs had only a few lawyers who mostly worked part-time, often handling legal aid cases at their own private offices. Private donations and some modest municipal subsidies provided the funding. Legal aid offices established stringent eligibility guidelines; most cases involved family law issues (not including divorce), landlord-tenant disputes, and consumer problems.

Reginald Heber Smith, general counsel of the Boston Legal Aid Society, undertook the first national study of legal aid in 1919. His book, *Justice and the Poor*, documented 40 organizations in 37 cities and urged the private bar to expand the legal aid movement.<sup>33</sup> In response, the American Bar Association for the first time publicly recognized that the nation’s legal profession has a special obligation to advance the cause of equal justice.

At the 1920 ABA convention, one of the Association’s historic figures, Charles Evans Hughes, issued his famous challenge: “The legal profession owes it to itself that wrongs do not go without a remedy because the injured has no advocate. . . . Does the lawyer ask, ‘Who is my neighbor?’ I answer, ‘The poor man deprived of his just dues.’”<sup>34</sup>

Nonetheless, the legal aid movement initially grew slowly. By 1947, only 70 legal aid programs operated across the country. Many more programs were created by 1963, though, as bar support gained momentum.<sup>35</sup> Despite the increase in the number of programs, only \$4 million was spent annually on legal aid in the early 1960s. This funding came primarily from the private bar, private foundations, and local charities, particularly the United Way.<sup>36</sup> It did not include the value of *pro bono* services provided by volunteer attorneys.

*“Justice, sir, is the great  
cause of man on this earth. It  
is the cement which holds  
civilized beings and civilized  
nations together.”*

*–Daniel Webster, 1851*

**OEO Office of Legal Services** – In 1964, Congress passed the Economic Opportunity Act, commonly known as the War on Poverty. The administering agency, the Office of Economic Opportunity (OEO), included legal services as an activity that could be funded as part of an anti-poverty program.<sup>37</sup>

The OEO Legal Services Program marked the first substantial government funding of legal representation of poor people in civil cases. The first year budget of \$25 million increased the nation's total public and private investment in civil legal services for the poor five fold.<sup>38</sup> A year later, the budget grew to \$40 million, funding 2,000 lawyers in 800 neighborhood law offices in over 250 locally operated community agencies.<sup>39</sup> In succeeding years, the OEO Legal Services budget edged up slowly, barely keeping pace with inflation, until it reached \$71 million in 1973.<sup>40</sup> In 1974, with the Nixon Administration's support, Congress created the Legal Services Corporation (LSC) to take responsibility for the program created under OEO.<sup>41</sup>

**Legal Services Corporation** – The Legal Services Corporation's purpose is to provide financial support and comprehensive legal services to those “unable to afford adequate legal counsel.”<sup>42</sup> LSC is a non-profit corporation, not a federal agency. LSC does not itself litigate or advocate for the poor; instead, it funds local, non-profit programs that engage in legal representation for the poor in every county in the U.S.<sup>43</sup>

LSC's structure for civil legal services delivery is unique among federal programs. While it has national goals, LSC gives decision-making power to the state and local levels where the people involved are familiar with the needs of their own communities. LSC is efficient and cost-effective, as 96% of its annual appropriation is disbursed to local programs.

The core funding that LSC provides also generates additional funding and resources at the local level. By leveraging LSC's \$400 million 1994 appropriation, for example, local programs secured more than \$200 million in additional resources from state and local governments, private foundations, corporations, and individuals.<sup>44</sup>

For many years LSC has funded 325 programs that have handled about 1.5 million legal matters each year affecting the lives of low-income clients.<sup>45</sup> Only about 15% of these matters have involved any litigation and almost one-third have involved advice only.<sup>46</sup> The single largest category of cases have been family matters, followed by housing, income maintenance, and consumer or finance problems.<sup>47</sup>

The Carter years brought the second and last substantial increase in federal funding of civil legal services for the poor. During those four years, LSC's budget quadrupled to \$321 million.<sup>48</sup> In 1981 dollars, that was enough to reach an interim goal, actually a plateau, of what then was termed “minimum access” – one lawyer for every 5,000 poor people.<sup>49</sup> (This number contrasted with one lawyer for every 400 people in the general population.)<sup>50</sup>

Any hopes that government investment would increase from the “minimum access” plateau toward fuller funding were dashed during the Reagan years. The initial impact of the Reagan Administration's policy was a 25% reduction in program funding, a cut to \$242 million in FY 1982.<sup>51</sup> The LSC budget crept up slowly in the following decade, falling well behind inflation, and has only recently exceeded the 1981 figure of \$321 million.<sup>52</sup> In real, inflation-adjusted terms, however, the FY 1995 LSC budget of \$415 million was *less than half* of the FY 1981 budget.<sup>53</sup>

The federal funding situation for legal services for the poor only worsened in 1996. While the FY 1995 appropriation for LSC was \$415 million, the level of

support for FY 1996 was cut 33% nationally, resulting in a 38% loss to California. Funding for support centers was eliminated. New restrictions were also placed on federal funding, effective immediately on all new cases, although programs were allowed three months to finish or transfer certain open cases. These restrictions seriously limited substantive legal services work and were applied to the use of money from non-federal sources as well.

**IOLTA and Expanded Pro Bono** – Two positive developments occurred during the 1980s: Interest on Lawyers Trust Accounts (IOLTA) funding at the state level and dramatic expansion of pro bono programs at the local level. There are now IOLTA programs in all 50 states.<sup>54</sup> Before interest rates plummeted in 1991, these programs together were contributing up to \$150 million per year to support local legal services agencies.<sup>55</sup> Lower interest rates caused national IOLTA funding to drop from its peak in 1991 to approximately \$94 million in 1993.<sup>56</sup> The impact of these reductions has been especially severe for the many programs that do not receive LSC grants and, therefore, rely heavily on IOLTA for their funding.

The expansion of organized pro bono programs has made a less precise but still significant contribution. Nationally, an estimated 135,000 private lawyers provide free legal representation to hundreds of thousands of people each year who would otherwise go without counsel.<sup>57</sup>

Nevertheless, combining all three funding sources – the LSC budget, IOLTA funds, and pro bono efforts – the nation's investment in legal services for the poor falls far short of meeting the need. With the IOLTA share dramatically reduced, the total value of legal services provided to poor people in FY 1994 was in the \$500-\$600 million range.<sup>58</sup> With further reductions in LSC and IOLTA funding, it was even lower in FY 1995.

To put that figure in perspective, Americans who can afford lawyers spend over \$100 billion per year for their services. But the U.S. spends around *one-half of one per cent* of the nation's combined private-public expenditures on lawyers for the nearly 20% of the population deemed poor.<sup>59</sup> In contrast, U.S. expenditures on health care for the poor total nearly 15% of combined private-public expenditures on health care.<sup>60</sup> In summary, poor people are getting 15% of the total amount of money spent on health care in this country, but less than one per cent of the total amount spent on legal services. (For California's 1990 comparative statistics on private and public expenditures for legal services and medical services, see Table 2.)

## **The California Experience**

California's experience with the development of civil legal assistance for the indigent closely parallels that of the nation as a whole. While lawyers have contributed free services on an individual basis since the days before statehood, the Bar Association of San Francisco established California's first organized legal aid program in 1916.<sup>61</sup> Funded by the Community Chest, the San Francisco Legal Aid Society was governed by a board of directors comprised of both lawyers and social workers.

By 1929, organized legal aid societies were also operating in Long Beach, Los Angeles, Oakland, and San Diego. They were almost entirely supported through charitable contributions. That same year, Los Angeles' legal aid society established the state's first law school-sponsored clinic in cooperation with the University of Southern California.

In 1936, the State Bar officially recognized the obligations of individual lawyers to provide pro bono services to Californians who could not afford counsel.

*It is the duty of every California lawyer under the provisions of section 282 of the Code of Civil Procedure, "never to reject, for any consideration personal to himself the cause of the defenseless or the oppressed." Consequently, it is the duty of lawyers, under their oath, to assist those in need of legal services who are not financially able to pay for such services.*<sup>62</sup>

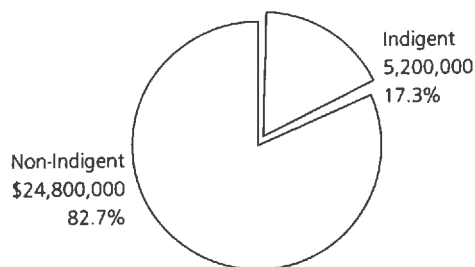
This policy statement was but the first of the State Bar's many efforts over the years to encourage individual lawyers to help expand access to justice.

**Legal Aid Movement** – The legal aid movement grew slowly but surely, and California had modest legal aid programs in 24 of 58 counties when the OEO's Office of Legal Services was created in 1965.<sup>63</sup> With federal funding available for the first time, the growth of the legal aid movement accelerated during the next decade. By 1976, the year the Legal Services Corporation took over responsibility for funding OEO programs, California was receiving grants totalling \$10.2 million to operate legal services programs in all 58 counties.<sup>64</sup>

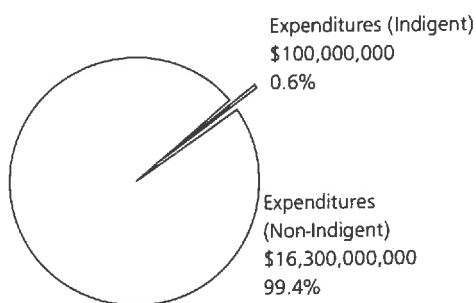
By 1980, federal funding levels reached their high point and there was one federally-funded attorney for every 5,000 poor persons. In that year, an estimated 80% of the budgets of the nation's legal services programs came from LSC.<sup>65</sup> However, even at its short-lived zenith, federal funding fell far short of providing the amount of legal services necessary to meet the needs of the 3.7 million poor people in California at the time.<sup>66</sup>

**Table 2. Comparison of Expenditures for California Indigent Medical and Legal Needs to Expenditures for Private Medical and Legal Needs, 1990.**

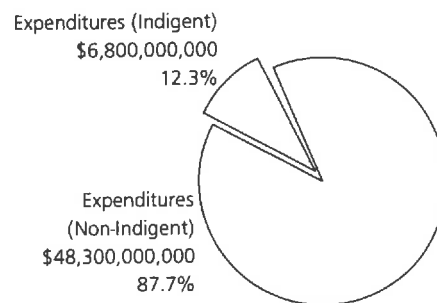
**California's Indigent and Non-Indigent Population**



**Distribution of Legal Services: Expenditures on Private (Non-Indigent) vs. Indigent Population**



**Distribution of Medical Services: Expenditures on Private (Non-Indigent) vs. Indigent Population**



Source: Data from Earl Johnson, Jr., *Toward Equal Justice: Where the United States Stands Two Decades Later*.

Between 1981 and 1990, the poverty population increased by more than 40%, to almost five million. In contrast, the amount of legal services available to California's poor has declined precipitously. During 1982 alone, the first year of the Reagan Administration, California's federal funding was reduced by 25%.<sup>67</sup> The number of California legal services attorneys decreased 20% between 1980 and 1990. Prior to the 1996 cuts, there was only one attorney for every 11,000 poor people in California – less than half the inadequate number of the early 1980s.<sup>68</sup>

The FY 1996 cuts in federal funding had a significant impact on California: the state lost over \$17 million. California's six nationally recognized support centers were completely cut from funding as a result of the appropriation. The additional loss of a national line item for funding legal services for migrant farm workers meant such programs must now receive funding out of each state's federal allocation, thereby reducing other programs' grants. California is home to significantly more migrant workers than any other state in the country.

**Pro Bono and IOLTA** – California lawyers responded to the first wave of cuts in federal funding in two ways: by increasing pro bono work dramatically and by supporting the creation of an IOLTA program in the state.

The State Bar's Office of Legal Services has been actively developing and supporting pro bono programs since its inception in 1979. Today, California lawyers provide legal services to the indigent through more than 100 organized pro bono programs. These programs report about one million hours of work are contributed each year by private, volunteer lawyers. This volume of pro bono work is substantial by any measure and represents a huge donation when calculated in market-value dollars.<sup>69</sup> The legal profession as a whole has made a serious, long-term, and laudable commitment to providing much free representation for the poor through pro bono activities.

IOLTA programs have provided significant supplementary funding to civil legal assistance programs since the early 1980s. California's Legal Services Trust Fund Program, established in 1981, was one of the first in the nation. According to the statute which regulates the program, California attorneys who hold client funds which are either small in amount or are held for a short period of time must place them in an interest-bearing IOLTA account. Banks forward the interest earned to the State Bar, which in turn distributes the funds through the Legal Services Trust Fund to qualifying non-profit legal services programs in the state.

Since 1985, the Trust Fund program has come to be the second largest source of funding for legal services in California, a crucial supplement for 114 legal services programs. Between 1983 and the end of 1991, from the inception of the Trust Fund until interest rates began to drop, the Trust Fund's revenue totalled \$125 million. Annual grants peaked at \$22.7 million in 1992-1993, when they represented more than one-fifth of all expenditures for legal services in the state.<sup>70</sup> The general decrease in interest rates has contributed to the current funding crisis. Trust Fund revenue plummeted over two-thirds from 1992 levels to \$7.35 million in 1994-1995.<sup>71</sup> The impact has been devastating.

While interest rates have generally increased significantly, the rates banks pay on lawyers' trust accounts have only edged up slightly. It is unlikely that interest rates on checking accounts will return to 1990 levels in the foreseeable future. One reason for this is that increased competition from non-bank providers and growing consumer sophistication have placed significant pressures on banks to create new products, ones similar to the mutual funds and money market funds offered by their competitors. As a result, fewer consumers with substantial deposits are using

interest-bearing checking accounts, thus reducing the banks' incentive to increase these interest rates.

From a short-term perspective, the massive LSC cuts and the current IOLTA funding crisis create a situation so serious that some of the state's legal services programs may be forced to close their doors. This could leave clients in life-threatening situations without legal information or advice, let alone representation. From a long-term perspective, the current crisis means even more poor Californians will have to go without counsel. They will continue their difficult, often tenuous existence without the legal aid that might help address the significant problems they face.

- Women and children suffer chronic, life-threatening abuse by husbands and fathers, and there is no one to help them find a shelter and get a restraining order.
- Deadbeat parents refuse to pay child support, often forcing their children to seek public benefits. Crises in both district attorneys' offices and the courts mean that even when support orders exist, there is no one to see that both parents pay their share.
- Public benefits are wrongfully terminated, and there is no one to help get them reinstated.
- Landlords collect excessive rent for apartments without working appliances and running water, and there is no one to force them to make repairs.
- Minorities are barred by racial discrimination from education or employment, and there is no one to force schools and businesses to follow the law.
- Mentally and physically disabled individuals suffer without the health care to which they are legally entitled, and there is no one to advocate for services on their behalf.

*“The poor man looks upon the law as an enemy, not as a friend.  
For him the law is lawyers taking something away.”*

*—Robert F. Kennedy, 1964, U.S. Attorney General*

# 3.

## Growth of Poverty in California

As Yogi Berra once said, "Prediction is difficult, especially about the future." However, all signs indicate that California's 1990 population of 30 million will swell to roughly 50 million by the year 2020.<sup>72</sup> As the population grows, the number of people living in poverty will rise too. If the state's recent experience is any indication, the number of poor people will increase at a rate faster than that of the general population.

The potential for such growth highlights a bad situation that will only get worse unless we begin *now* to provide dramatically increased funding for access to justice and to develop new, less costly, and less cumbersome methods to deliver quality legal services to low-income people.

In 1980, approximately four million of California's almost 24 million residents were living in poverty.<sup>73</sup> By 1990, the state's overall population had increased over 25% to 30 million. During the same decade the poverty population increased over 40% to approximately five million – a rate of increase over 50% greater than the growth of the general population.<sup>74</sup> [By 1993, the poverty population had risen to almost six million. However, the calculations contained in the following chapters in this report reflect the 1990 figures because data from that year on both population and household income breakdowns were the most complete available.]

Just how poor is poor? Under federal legal services guidelines, low-income clients are eligible to receive free services if their income is 125% or less than the current poverty threshold established annually by the U.S. Department of Health and Human Services. For example, in 1996, a family of four whose total income did not exceed \$19,500 was financially eligible to receive free legal services.<sup>75</sup> (See Table 3 for more detailed information.)

Who are California's poor people, currently nearly six million in number? They are battered women, children, youth, the disabled, the elderly, farmworkers, the homeless, minorities, single parents, the unemployed, and crime victims.

**Table 3. 125% of the Federal Poverty Threshold, 1996.**

| Size of Family Unit | Annual Gross Income |
|---------------------|---------------------|
| 1                   | \$ 9,675.00         |
| 2                   | \$12,950.00         |
| 3                   | \$16,225.00         |
| 4                   | \$19,500.00         |
| 5                   | \$22,775.00         |
| 6                   | \$26,050.00         |

Source: Data from the Federal Poverty Income Guidelines, issued by the Department of Health and Human Services, set out at 61 FR 8286 (March 4, 1996).

*"It has been correctly stated that respect for the law is at its lowest with underprivileged persons. There is a natural tendency for such persons to think of the courts as symbols of trouble and lawyers as representatives of creditors and other sources of harassment."*

*–Lewis Powell, 1964  
ABA President and later  
U.S. Supreme Court Justice*

Contrary to what many people believe, the majority of California's poor adults are employed, but they do not earn enough to escape poverty.

### **Faces of Poverty**

There is no simple way to categorize the people who constitute the poverty population in California. People often fall within more than one group, for any labels given are rarely exclusive. Race and gender both play an important role in poverty statistics and must be considered when looking at most low-income populations. A complete understanding of poverty needs to consider the interplay of numerous factors and characteristics.

**Battered Women** – Half of all women will experience some form of violence from their spouses during marriage. Each year more than one million American women seek medical treatment for injuries deliberately inflicted upon them by their husbands, ex-husbands, or boyfriends. A disproportionate number of battered women nationally and in California are poor. Women with family incomes of less than \$9,999 annually are more than five times as likely to experience violent victimization by an intimate as those with family incomes over \$30,000. Domestic violence is also a leading cause of homelessness. According to one Ford Foundation report, 50% of all homeless women and children in this country are fleeing from domestic violence.<sup>76</sup>

**Children** – Californians are younger than residents of other states and since the state's birth rate is 20% higher than the rate in the rest of the nation, our households are more likely to include children. California's children, especially minority children, have become poorer in the last decade. The U.S. General Accounting Office reports that during the 1980s the number of poor preschool children rose from 18% to 19%. Since that time, California's recession has driven the number of poor children up to 2.2 million – one in four compared to the national average of one in five.<sup>77</sup>

The recent cuts in Congressional funding for former safety net programs particularly affect young children and their families. Not only will millions more be forced into poverty, but those already living in poverty will become poorer as well. Essential help for children has been dramatically altered in many areas. These include welfare, AFDC, health care, child protection, maintenance of effort requirements, work requirements for women with young children, family caps, child care, food stamps and child nutrition, and benefits for disabled children.

**Youth** – It is becoming increasingly difficult for young people to find work at decent wages, not only during California's persistent recession, but also as long-term employment prospects in the manufacturing sector diminish and the need for technical skills to compete in today's labor market increases. The poverty rate among families headed by a person under age 25 has more than doubled during the past decade.<sup>78</sup>

**Disabled** – Nearly two million Californians between the ages of 16 and 64 have one or more disabilities.<sup>79</sup> Even though many in this population are able to work and are seeking employment, the unemployment rate for employable disabled workers remains significantly higher than the rate for other residents. Therefore, a disproportionate number of disabled people continue to live in poverty.

**Elderly** – During the past ten years the number of older Californians has increased. In 1988, there were 4.2 million seniors in California, or one of every seven residents. According to a report by the U.S. Department of Commerce, about one out of every seven Americans over the age of 65 lives in poverty, with elderly women almost twice as likely to be poor as elderly men.<sup>80</sup>



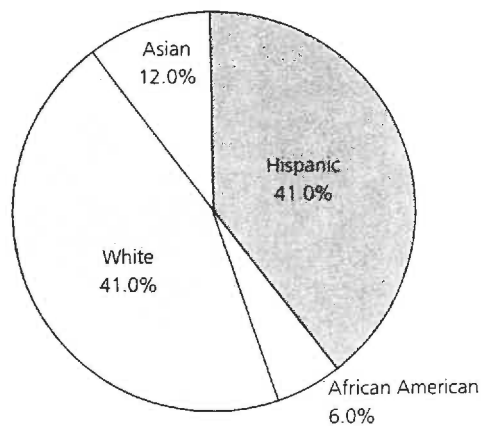
**Farmworkers** – Agriculture is California’s largest industry, generating nearly \$18 billion in sales annually. Seasonal and migrant farmworkers are a critical component of the state’s agri-business. There are approximately 800,000 farmworkers in California.<sup>81</sup> However, 90% of these farmworkers are employed 30 or fewer weeks each year. In addition to being underemployed, farmworkers normally earn very low wages. In 1993, the median personal income of authorized workers was between \$5,000 and \$7,500 a year, while unauthorized workers earned between \$2,500 and \$5,000. As a result, up to 90% of farmworkers with large families are living below the poverty line, while almost 50% of two-person farmworker families qualify for legal assistance.<sup>82</sup>

The recent deep cuts in federal funding for LSC included the loss of a national priority for migrant funding. As a result, migrants will go unrepresented even more often, despite their desperate situation.

**Homeless** – Estimates vary, but it is generally agreed that more than 850,000 Californians experience an episode of homelessness during a given year. The most significant increase in homelessness in recent years has been in single-parent families with children. Emergency shelters estimate that, excluding runaways, as many as 225,000 children are homeless at any one time.<sup>83</sup> All of California’s homeless live in dire poverty, and once people become homeless it is extremely difficult to break out of the poverty cycle. The number of homeless people is likely to increase further in coming years as elements of the “safety net,” which traditionally provided a minimal level of economic support for extremely poor people, are changed or dropped entirely.

**Minorities** – Demographers predict California will have a majority of people of color as soon as the year 2000. Disproportionate numbers of these people will be poor, though. By 2020, the state’s population may be 41% Hispanic, 12% Asian, six per cent African American, and 41% white. (See Table 4. ) California is also home to more than 130 Indian tribes, almost one-third of all the tribes in the country.<sup>84</sup> Almost 225,000 Native Americans live in California, and at least 100,000 of them are living in poverty.<sup>85</sup>

Table 4. Projected California Population Distribution in 2020.



Source: Data from the U.S. Census

**Single Parents** – The number of single-parent families in California has doubled in the last decade, and one in four children now live with a single parent. With the increase in single, female heads-of-household, the poverty rate among these families has also risen. In 1980, over 25% of California families headed by women lived below the poverty line. By 1987, this figure had increased to almost 40%.<sup>86</sup>

**Unemployed** – The recession has affected Californians dramatically. Over the past four years, California's official unemployment rate has skyrocketed to 9.7%. This is twice the state's rate in January 1988. Meanwhile, median incomes for Californians have declined, edging more and more people below the poverty line. Even in normal economic times, though, California's unemployment rate hovers around six per cent, making a substantial contribution to the state's poverty population.

**Crime Victims** – Victims of crime come overwhelmingly from poor or near-poor populations and the crimes often leave them in devastating economic conditions. Crime victims who are unable to get a lawyer's counsel are often unable to recover monetary losses or to afford treatment made necessary by the crime. They may be unable to re-enter the job market and therefore remain in or fall into poverty.

### **Future trends**

Future trends likely to affect California's poverty population portend continued growth in the number of the state's poorest residents. These trends include increasing impoverishment of people of color, continued immigration, changes in family structure, an aging population, a changing job base, and the extended recession.

The future for the poor in California is particularly worrisome given the disproportionate impact regulatory changes and funding cuts have on them. Many of the state and federal programs undergoing major transformations are those that were originally designed to act as safety nets for the poor. Certain segments of the low-income population will be particularly hard hit by any such modifications and by any decreased availability of legal services. These groups include people of color, migrant workers, and immigrants.

# 4.

## Quantifying Legal Needs

### The Poor

More than twenty five legal needs studies have been conducted throughout the U.S. during the past twenty years. These studies, listed in the notes at the end of this report, consistently conclude that over 80% of the legal needs of the nation's poor are not being met.<sup>87</sup>

At least fifteen of these studies have attempted to count the annual rate of legal problems experienced per household in the jurisdictions sampled. The range of results has been quite broad, from 1.0 to 4.12 legal problems per year in each poor household. Such variation is due in large part to the different methods employed in the studies.

For example, a 1987 Massachusetts study revealed an average of 0.94 legal needs per household,<sup>88</sup> a conservative average when compared to the results of studies in other states. On the other end of the spectrum, a 1986 New Jersey study found an average of 4.12 legal needs per household,<sup>89</sup> while a 1987 Colorado study found an average of 3.7.<sup>90</sup> Despite this variation, every one of the studies reports an annual average of at least one unmet legal need per household.

The Access to Justice Working Group relied on the accumulated wisdom of such studies to calculate the percentage of unmet legal need in California rather than use limited resources to conduct an entirely new study for this report.

#### American Bar Association Study

The 1994 American Bar Association *Comprehensive Legal Needs Study* (CLNS)<sup>91</sup> is not only the most recent national study, but also the largest in sample size and broadest in scope. It provided a wealth of data quantifying the legal needs and experiences of both low- and moderate-income Americans.

The CLNS provided estimates at the national level. While its sampling design covered all regions of the country, it did not provide California-specific data. Consequently, use of the CLNS estimates and conclusions assumes that California, which represents 12% of the nation's population, is not different from the country as a whole.

The CLNS showed that low-income households averaged 0.8 (or just under one) new legal need each in 1992. Specifically, of the 1,782 poor households contacted (1,525 by telephone and 257 in person), 40% reported at least one new legal need in 1992. (See Table 5.) Those households with legal needs reported an average of 2.1 needs each.<sup>92</sup>

The survey found an additional seven per cent of low-income households had ongoing legal needs, but no new needs, in 1992. Those households averaged 2.3 ongoing legal needs each.<sup>93</sup>

The CLNS concluded that, on average, poverty households experienced 0.8 legal needs per year. The Working Group, given the range of estimates available

*Elena Sanchez, an elderly widow in subsidized housing, was given a 30-day eviction notice because the landlord erroneously believed unauthorized persons shared the apartment. Actually, the 90-year-old woman's son visited weekly to help with shopping and cleaning. As he lived nearly 100 miles away, he stayed over night and returned home the next day. With help from Legal Services of Pasadena & San Gabriel-Pomona Valley, the widow was able to negotiate a dismissal of the eviction action. The complex's owner later terminated the manager.*

from the CLNS and earlier studies, assumed poverty households had approximately one legal need each per year and used this figure for the poor population throughout the rest of this report.

Appendix One to this report provides more detailed information drawn from the CLNS. This includes data on the incidence of legal problems by region, the types of legal needs Americans most frequently experience, their awareness of legal services, and their use of lawyers.

### Depth of Unmet Need of California's Poor

Based on the CLNS conclusion that low-income households experienced an average of one legal need each in 1992, it is possible to estimate the total number of annual legal needs of California's poor residents. As noted above, however, because of the CLNS' small sampling from California, these legal needs calculations are not statistically significant.

The Census Bureau estimates 17.5% of Americans live at or below 125% of the poverty level. (This 125% figure is the income eligibility level for legal services programs used by the Legal Services Corporation and California's Legal Services Trust Fund Program.) The 1990 census shows there were then just under five million (4,953,374) poor Californians. Based on Census data, there are an average of 2.789 people per household. Applying this average to California's poor population shows there were nearly 1.8 million poor households in the state in 1990.<sup>94</sup> Each of these had an average of one legal need.<sup>95</sup>

The Working Group used data from 1990 in its evaluation of unmet legal needs because 1990 was the only year for which complete data on the population in poverty, households, and income levels were available at the state level. The most recent information indicates the number of poor Californians rose to almost six

**Table 5. Amount of Legal Need Experienced by Low- and Moderate-Income Households, 1992.**

|                                   |                   | Incidence <sup>1</sup>   |                            | Prevalence <sup>2</sup>  |                            |
|-----------------------------------|-------------------|--------------------------|----------------------------|--------------------------|----------------------------|
|                                   |                   | Number of All Households | Per cent of All Households | Number of All Households | Per cent of All Households |
| <b>Low-Income Households</b>      | One or More Needs | 705                      | 40%                        | 839                      | 47%                        |
|                                   | No Needs          | 1,077                    | 60%                        | 943                      | 53%                        |
| <b>Moderate-Income Households</b> | One or More Needs | 595                      | 46%                        | 672                      | 52%                        |
|                                   | No Needs          | 710                      | 54%                        | 633                      | 48%                        |

**Table 5A. Average Number of Legal Needs Per Household, 1992.**

|   |                       | Average Number of Needs Per Household |                 |
|---|-----------------------|---------------------------------------|-----------------|
|   |                       | Low-Income                            | Moderate-Income |
| <b>Incidence<sup>1</sup> Based on:</b>  | All Households        | 0.8                                   | 0.9             |
|   | Households with Needs | 2.1                                   | 1.9             |
| <b>Prevalence<sup>2</sup> Based on:</b> | All Households        | 1.1                                   | 1.0             |
|   | Households with Needs | 2.3                                   | 2.0             |

1. **Incidence:** the number of first time needs occurring within the year

2. **Prevalence:** the number of ongoing needs

Source: Data from the American Bar Association's *Comprehensive Legal Needs Study*.

million by 1993.<sup>96</sup> However, complete household and income data are not easily accessible for that year. The calculations contained in this and the following chapters are, therefore, very conservative.

## The Near-Poor

### The Near-Poor Population

The amount of need described above does not address the legal needs of California's near-poor families. The high cost of housing in the state, particularly in urban areas, means most of these families cannot afford many of life's basics, including badly needed legal services. Calculating the level of their legal need requires information about their numbers and their annual rate of legal needs.

To arrive at a working definition of the near-poor,<sup>97</sup> the Working Group adopted a definition of poor and near-poor households using information about the first two "quintiles" (40%) of household income distribution. The near-poor households are those within this group who have incomes above 125% of the poverty level. In 1990, there were approximately four million households in the first two quintiles.<sup>98</sup> These two quintiles encompassed households with annual income levels under \$27,500.

In 1990 there were approximately 1.8 million households living below 125% of the poverty level in California. (See above.) There were over two million non-poverty near-poor households.<sup>99</sup> Near-poor households experienced approximately 0.9 legal incidents per year.<sup>100</sup> Multiplying the near-poor population figure by 0.9 gives almost two million (1,975,937) legal needs per year for this demographic group.

### Depth of Unmet Need of California's Near-Poor

The next step is to find out how many of these legal needs were unmet.<sup>101</sup> If unmet needs are defined as all incidents where nothing was done (regardless of satisfaction with the outcome) or where the person's own action, nonlegal action, or action by a nonlegal third party yielded unsatisfactory results,<sup>102</sup> we can estimate that the near-poor had over 800,000 (813,098) *unmet* needs per year.<sup>103</sup> [For an estimation of the number of annual unmet legal needs of California's poor population, see Chapter 7. ]

### Response to the Need

The extent to which the legal needs of California's poor and near-poor were met varied and will be studied in more detail in the following chapters of this report. It is important to note at the start, though, that the legal system cannot provide access to a remedy for every single legal problem. Although this might be an idealized result, society simply cannot afford to do so.

Some of the poor and near-poor California households that experienced a legal need would not have sought legal assistance even if it had been available. They had no confidence the justice system could solve their problems. Other households, upon closer inspection, found they did not, in fact, require legal assistance.

On the other hand, there were many households with problems that required legal help whose needs went unmet. These people fell into two groups. Some got legal assistance but did not receive the amount or type of aid they needed. Others, the majority, did not receive any legal assistance at all.

## **The Moderate-Income**

Moderate-income households (for example, those with annual incomes approximately between \$27,500 and \$45,000) also frequently find it difficult, if not impossible, to afford legal services. The 1,305 moderate-income households contacted during the ABA's CLNS survey reported an average of 1.0 new and ongoing legal needs in 1992.<sup>104</sup>

However, only 39% of moderate-income households that reported a legal problem said they had taken legal or judicial action to resolve that problem. Another 23% attempted to solve their problem through their own efforts, while 12% sought the assistance of a non-legal third party. Twenty six per cent said they had taken no action at all.<sup>105</sup>

More specific data on the unmet legal needs of moderate-income Californians are extremely difficult to determine. Since the Access to Justice Working Group is not recommending financial subsidies for this group, given its size and relative income level, it is not necessary to the report to develop detailed estimates for them. What is necessary is to look at modified delivery methods that can help improve access for this population group. (See Chapter 6.)

*The Women's Development Center, which is a transitional housing project for homeless women and children, was created through the efforts of Nevada County Legal Services. Over the past three years, the Center has operated nearly 50 units of housing for homeless families and currently is in the process of purchasing a number of these houses. The Center, which might not exist were it not for Nevada County Legal Services, continues to prosper and is now a permanent grantee of the local United Way.*

# 5.

## Amount of Access to Justice California Now Provides to the Poor

### Amount of Legal Need Met

According to the State Bar's Legal Services Trust Fund office, in 1993 the state's 121 legal services programs closed almost half a million (499,887) cases.<sup>106</sup> However, just because a case is closed does not necessarily mean the underlying legal need was fully met.

The term "closed case" covers a wide range of case resolutions, from a five-minute telephone consultation all the way to representation at trial or on appeal. In 1993, almost 85% of closed cases involved counsel and advice, brief service other than counsel and advice, referral to another agency after legal assessment, or the determination there was insufficient merit to proceed.<sup>107</sup> These terms are defined as follows:

- Counsel and advice generally refer to a discussion about the perceived legal problem and a short review of options available to the party.
- Brief services means slightly more involvement, at most including completing some forms, making a few telephone calls, or doing some investigation. The amount of brief service provided by attorneys that legal services programs can offer is diminishing. Low-income people increasingly receive such services through self-help clinics and/or paralegals.
- Referrals usually occur when the problem presented is either not specifically legal or is one that falls outside of the services available at the legal services office. (They include referrals to pro bono lawyers.) These problems can sometimes be handled best by another agency that specializes in a particular area of service or law. It is increasingly common, however, that no other agency handles problems and clients are referred to self-help, to inadequate resources, or back to a referring agency.
- When a determination of insufficient merit is made, this means either the party has no legal claim or the evidence available is not strong enough to support a claim. (See Table 6 for more detailed information.)

Only eight per cent of closed cases involved more in-depth service: negotiated settlement with or without litigation; a decision by an administrative agency; or a court decision. While brief service was all that some clients needed, others required more but the legal services program did not have the resources to take on full representation. Therefore, it is important to emphasize that some clients with closed cases did not receive the amount or quality of legal services they actually needed.<sup>108</sup>

It is also important to emphasize that, although the statistics from individual programs may be accurate, aggregating the numbers of clients served probably involves substantial duplication. For example, a client who received brief service from two or three different agencies would have been counted for each service,

*Joseph Shaw, age 13, has been a dependent of the court since 1987 when his mother was charged with beating him with a belt. He has not seen his father for nearly ten years. Joseph, who is quite bright, also has severe neurological deficits which interfere with his ability to learn and control his behavior. When he was placed in a foster home, the new school district said he would have to wait three months to begin classes. With help from Mental Health Advocacy Services, Joseph was in school within a week.*

resulting in a single poor person having his or her case “closed” two or three times. Nonetheless, the Working Group used these figures because they are the most meaningful ones available.

Assuming that 1.8 million poor California households each experienced an average of one legal need in 1993 (see Chapter 4) and about 500,000 cases were closed, about one-quarter of legal needs were fully or *partially* met.

This estimate of the percentage of legal needs met in 1993 appears to overstate somewhat the percentage of low-income people served. The apparent overstatement in the number of cases closed (noted above) and the substantial increase in the poor population since 1990 contribute to the imprecision of the approximation. The estimate would decrease significantly with a larger poverty population and smaller closed case figures. Recent cuts in federal funding will also likely cause the number and the percentage of low-income people served, in whole or in part, to drop dramatically.

Legal services programs were unable to provide any sort of assistance to about three-quarters of poor California households with potential legal needs in 1993. In addition, programs were only able to provide partial services to a substantial number of the approximately one-quarter of households with legal needs who did receive some form of assistance.

### Current Funding Levels

In 1993, legal assistance in these 500,000 cases was provided by California’s 121 legal services programs, 99 of which directly served indigent clients. The services provided included advice and referral, pro per clinics at which clients learned the basics of self-representation, brief office consultations, and in relatively few cases, representation by an attorney in an administrative or court proceeding.

The other 22 legal services programs were support centers that acted as “senior partners” to lawyers and paralegals at the 99 direct service programs. The support centers provided back-up services, including specialized research, advice and consultation, and training. Some of the support centers also handled major litigation, such as class action lawsuits, intended to benefit many people simultaneously.

**Table 6. Trend in Disposition of Legal Services Cases in California, 1989–1993.**

|  | Major Reason Case Closed |                             |                                 |                               |                                   |  |                                       |                                |                |                                      |             |
|--|--------------------------|-----------------------------|---------------------------------|-------------------------------|-----------------------------------|--|---------------------------------------|--------------------------------|----------------|--------------------------------------|-------------|
|  | Counsel and Advice       | Brief Services <sup>1</sup> | Referred after Legal Assessment | Insufficient Merit to Proceed | Total Brief Services <sup>2</sup> | Negotiated Settlement without Litigation | Negotiated Settlement with Litigation | Administrative Agency Decision | Court Decision | Total Extended Services <sup>3</sup> | Total Cases |
| <b>1989</b>                                | 153,969                  | 102,397                     | 37,727                          | 4,191                         | 298,284                           | 6,474                                    | 4,364                                 | 10,875                         | 8,477          | 30,190                               | 360,971     |
| <b>Percentage of total cases</b>           | 42.6                     | 28.4                        | 10.5                            | 1.2                           | 82.6                              | 1.8                                      | 1.2                                   | 3.0                            | 2.3            | 8.4                                  |             |
| <b>1993</b>                                | 188,326                  | 157,411                     | 71,470                          | 5,973                         | 423,180                           | 8,706                                    | 5,099                                 | 16,590                         | 10,868         | 41,263                               | 499,887     |
| <b>Percentage of total cases</b>           | 37.7                     | 31.5                        | 14.3                            | 1.1                           | 84.6                              | 1.7                                      | 1.0                                   | 3.3                            | 2.1            | 8.2                                  |             |
| <b>Change in percentage of total cases</b> | 4.9% decrease            | 3.1% increase               | 3.8% increase                   | 0.1% decrease                 | 2.1% increase                     | 0.1% decrease                            | 0.2% decrease                         | 0.3% increase                  | 0.2% decrease  | 0.2% decrease                        |             |

1. Other than Counsel and Advice

2. Sum of first 4 columns

3. Sum of second 4 columns

Source: Data from the State Bar of California Legal Services Trust Fund Program.



This work will become more important as LSC-funded groups are restricted. However, the fact that national centers recently lost their LSC funding makes it more difficult for them to fulfill their mandate. Five or six of the support centers are national in scope; the others provide services only to California programs.

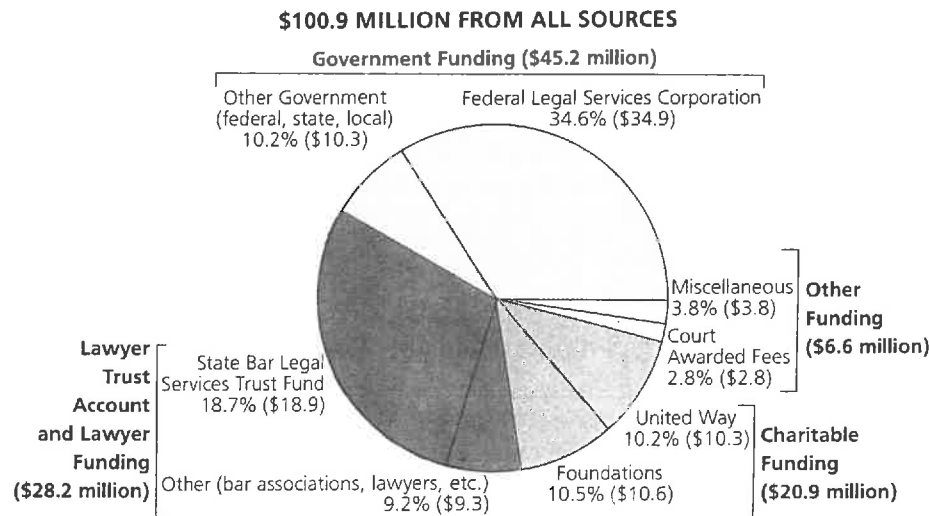
In 1993, these 121 programs reported to the bar's Legal Services Trust Fund Program that they had received funding totalling approximately \$100 million from all sources.<sup>109</sup> (See Table 7.) The federal Legal Services Corporation was the single largest funding source, providing 35% of all funds, or a total allocation of \$35 million. Other government funding (federal, state, and local) totalled only around \$10 million, or 10%. Therefore, government funding from all sources equalled around \$45 million, or 45%.

The State Bar's Legal Services Trust Fund Program was the second largest funding source, with grants amounting to nearly 20% of total funding, or \$19 million. Other funding sources for legal services programs included the following: foundations and the United Way, which each contributed around \$10 million, or 10% each; other contributions (from bar associations, individual lawyers, fundraising events, etc.) totalling over \$9 million, or 9%; court-awarded fees totalling almost \$3 million, or 3%; and miscellaneous funding totalling almost \$4 million, or 4%.

Non-governmental sources of funding are receiving an ever-increasing number of requests in these days of decreased governmental support. As a result, legal services programs cannot count on significant expansion in funding from these sources. Foundations, for example, are pressed by many competing needs and are not likely to supply much more money to legal services than they do presently. The United Way is undergoing a massive reorganization and setting new priorities, so that source is similarly unlikely to grow. In addition, United Way funding will not necessarily be renewed from year to year. If legal services funding is to increase to meet the need, it will require new initiatives from many directions.

Despite the enormous level of California's unmet legal need, the state's legal services programs are already trying to make do with limited resources. This dire situation was succinctly outlined in *Unequal Justice*, a report on the declining

**Table 7. 1993 Funding Sources for California's 121 Legal Services Programs (in Millions of Dollars).**



Source: Data from the State Bar of California Legal Services Trust Fund Program.

availability of legal services for California's poor issued by the Public Interest Clearinghouse in 1991.

According to that report, of 106,953 active lawyers in California in 1991, only 517 were legal services lawyers. This was a decrease from approximately 645 in 1980 when the state had only 68,538 active attorneys, and represented a 20% decrease in the number of legal services attorneys available to represent poor people. Meanwhile, the rest of the bar grew over 80% in that same period.<sup>110</sup> As of 1993, the state had 113,727 active attorneys.<sup>111</sup>

From 1980 to 1990, as noted above, the number of poor Californians increased by 41%. The result? Each legal services lawyer was responsible for the needs of nearly twice as many poor people in 1990 as in 1980. There were 10,027 poor for each legal services attorney in 1990 compared with 5,727 per attorney a decade earlier.<sup>112</sup> For the majority of poor Californians, minimal access eroded to no access at all. In fact, approximately 75 out of every 100 times that poor Californians experienced legal needs, they did not receive legal assistance.

### **Legal Services Programs Barely Coping**

Legal services programs are constantly fighting an uphill battle. The cost of operating a program, according to *Unequal Justice*, has increased substantially in recent years. Individual programs have already eliminated all frills and many essentials. They have also cut back on services provided. With current reductions in Legal Services Trust Fund monies and the drop in LSC and other federal sources, programs are also being forced to layoff staff and reduce or eliminate services.

**Shrinking Staffs** – Staffing levels at legal services programs have decreased dramatically.

- One legal services program, **San Francisco Neighborhood Legal Assistance Foundation**, was forced to reduce its staff between 1980 and 1993. They went from 72 employees (including 24 attorneys) in seven neighborhood offices in 1980 to 28 employees (with 13 attorneys) in one central office in 1993.<sup>113</sup> SFNLAF again had to cut back their staff in 1995-1996. They lost two of their 12 attorneys and one of their six paralegals. The numbers of domestic violence and public benefits advocates were preserved, but the number of housing advocates was reduced by half in this round of cuts.<sup>114</sup>

Reductions in IOLTA funding also hit programs hard.

- For example, as of November 1994, the **Legal Aid Society of Alameda County (LASAC)** had eliminated four positions, including one staff attorney and two telephone intake specialists, and they had funding for just one year for another attorney and paralegal. As a result, the program's benefits entitlement unit could serve fewer than half the clients it served a year before.<sup>115</sup> LASAC has made further staff reductions in the wake of 1995-1996 federal funding cuts as well. Although no offices have closed yet, one administrator, 7.5 of their 13 attorneys, three of their five paralegals, and five of their 11 support staff positions are gone.<sup>116</sup>
- The recent funding crisis caused the **Legal Aid Society of San Diego** to lose four of their 17 attorneys, two of their 16 paralegals, and six of their 28 support staff. The program had to eliminate all family law services and made severe cuts in housing litigation and services.<sup>117</sup>

- The **Legal Aid Foundation of Los Angeles** eliminated education as a priority area and can only take 40 cases per day in their Eviction Defense Center, half their former capacity.<sup>118</sup>

Support centers have similarly reduced staff and services.

- The **National Center for Youth Law**, for example, lost approximately three staff members. They estimate they will handle significantly fewer requests for assistance from field programs in 1996, probably going from 1,200 to 400.<sup>119</sup> The **Western Center on Law and Poverty** now has one-half the attorney staff they had in 1994 – a drop from 11 to 5.5. In 1995 they answered 3,500 calls from local programs. After the staff reductions they may have to turn away as many as a thousand requests for help annually.<sup>120</sup>
- Both of these support centers will decrease training opportunities for field programs and may have to cut the number of cases they co-counsel. When the **National Center for Youth Law** co-counseled in the past, they did 50-75% of the actual litigation work. Their staffing will no longer permit this, so co-counsel will have to do a majority of the work with the Center's support.<sup>121</sup>

**Impact on Quality** – Today more than ever, legal services programs are focusing on how to handle more cases more quickly while maintaining the high quality of representation. Decisions must be made carefully because funds and time spent on one case are not available to help another poor client. As a result, programs are extremely cautious when deciding whether to use expensive expert witnesses or discovery tools such as lengthy depositions. Although private attorneys routinely use these litigation techniques and pass the cost on to the clients, legal services attorneys must always weigh the cost and time against the needs of other clients.

- A special Court Reporters Fund in California which subsidizes the cost of deposition transcripts has helped substantially. However, it can only cover a small part of the total costs for potentially beneficial discovery mechanisms and expert witnesses. Legal services attorneys are well aware that failing to use such tools reduces their clients' chances of success and puts them at a distinct disadvantage. The Fund is allowed to distribute \$300,000 each fiscal year. It receives 400 to 500 applications each year and rejects approximately one-sixth of these.<sup>122</sup>

**Savings to Local and State Governments** – An increasing number of legal services programs are providing legal aid to clients that actually result in savings for local and state government entities. When a woman receives adequate child care payments and is able to stay off welfare or when an illegal eviction is stopped and a family is able to avoid homelessness, the client gets critical legal assistance and the government saves money as well. In fact, some local governments are beginning to provide grants to legal services programs to help realize these savings.

**Using Resources Effectively** – Legal services programs are dedicated and creative in making the best use of their extremely limited resources. They have always made extensive use of paralegals and other non-lawyer staff to maximize attorneys' time where it is most useful and to provide as much assistance to clients as is possible with limited resources. In addition, legal services attorneys' salaries are very modest when compared to those in the public and private sectors.

- For example, in San Francisco in 1996, a first-year attorney with California Rural Legal Assistance made \$26,000.<sup>123</sup> In the public sector, starting salaries for first-year public defenders and city attorneys were \$48,128.<sup>124</sup> In contrast, a lawyer beginning his or her legal career at a large private

firm started at \$77,000. Significant bonuses may also be added to salaries at private firms.<sup>125</sup>

Most of California's legal services programs have computers and software to help them automate some procedures and improve both operations and work product. Automated document assembly, for example, helps programs provide representation to many clients who have similar cases with almost identical documents needs. Many programs subscribe to a national on-line system, HandsNet, which has made significant improvements in the ways various programs share resources and coordinate their work. Programs have worked hard to use such technology effectively and have greatly increased efficiency as a result. Unfortunately, cost is a barrier; advanced and updated technology is expensive and programs often cannot afford to upgrade their relatively old models.

Many organizations have closed branch offices as a way to avoid duplicate overhead costs and, until recently, avoid laying off staff members. Such centralization has been particularly hard on the rural poor, however. These people may now may be forced to travel a great distance to the nearest legal services office. Some programs are attempting to fix this additional problem by experimenting with other delivery methods, such as circuit-riding, to provide some services to their geographically-distant population.

Many programs have set up clinics where a number of clients with related difficulties are provided an overview of the legal issues involved in such cases and given materials to help them represent themselves. While this is better than no assistance at all, many pro per litigants are still intimidated by having to face the judicial system alone. They are rarely able to prevail without an attorney in many types of cases.

Other legal services programs have instituted new "information and referral" systems. These are sometimes through electronic telephone systems and 800 access numbers. They give callers basic information and refer them to other helping agencies. These streamlined systems provide a minimum level of access to thousands of clients every year, and help free up staff to provide in-depth representation to clients with legal problems that threaten their most basic needs: food; housing; and medical care.

Legal services and pro bono programs have greatly expanded their partnerships with private attorneys who provide legal assistance for free. Programs conduct the intake process, serving a critical gatekeeper function as they refer clients to volunteer attorneys and also provide important poverty law expertise and training, as well as back-up support for the volunteers. The value of such pro bono services is considerable. In San Francisco alone, the value of legal services donated through the Bar Association of San Francisco's Voluntary Legal Services Program in one year totalled \$11 million.

Organized pro bono work takes a number of different forms to accommodate the needs of clients, volunteers, and legal services programs:

- Some legal services programs work directly with pro bono attorneys. Staff attorneys at these programs carry their own caseload while training and mentoring volunteers, and being available in emergencies when volunteers' private practices may make them unavailable.
- Pro bono lawyers may also work through free-standing pro bono organizations that provide cases and education for volunteers. The staff of such organizations may or may not be attorneys with their own caseloads, but their focus is generally to aid and support the volunteers. It is also possible for a pro bono program to involve elements of both of these models.

It is not possible, however, for pro bono work to come close to meeting the needs of the thousands of unserved clients in California for several reasons:

- The private bar, especially law firms, face economic pressures; cost and revenue issues have an impact on attorneys' time and priorities.
- Recruiting, training, and coordinating volunteer attorneys is difficult and time-consuming.
- When volunteer attorneys work directly with legal services programs, the programs need an existing infrastructure of expert staff attorneys who can interface with the clients as well as teach and guide the pro bono lawyers to be effective advocates in poverty law matters. However, they need resources to do so.

Such pressures and problems mean that although California's lawyers are very generous with their volunteer time, the legal needs of many of the state's low-income residents currently remain unmet.

# 6.

## Innovative Delivery Methods for All Californians

*Garment manufacturers who employ low-income people sometimes do not pay them the wages they have earned in long hours in sweatshops.*

*The Asian Law Caucus recently won a court-ordered judgment against a factory owner who could not be located. The workers received their back wages from a special Garment Workers' fund managed by the California Department of Industrial Relations.*

### Response to Unmet Need

Many states are making new efforts to find methods of increasing access to justice for the near-poor and middle class as a result of the ABA's legal needs study and similar studies conducted by at least fifteen states. For example, in Maryland two law schools, the state bar association, and the continuing legal education agency are currently conducting a joint survey of near-poor and moderate-income people. They have defined these groups as residents with annual incomes between \$15,000 and \$45,000. The goal of the study is to determine exactly what prevents such people from obtaining legal assistance when they need it.<sup>126</sup>

Once these factors are identified, the consortium conducting the study intends to recommend changes to law school curricula and continuing legal education programs in order to prepare solo and small-firm practitioners to make a living while meeting the needs of this client population. One component of the study will be a law office laboratory, housed at one of the sponsoring organizations, that will study in-depth the changes in practice necessary to increase access to justice for these clients. These changes will likely include developing technology, law office management, fee structures, and modifications in substantive law.

### Development and Expansion of Innovative Delivery Methods

The Maryland study represents one example of a novel approach to developing methods of delivering additional legal services to people whose annual incomes are roughly between \$15,000 and \$45,000. (Such methods, developed to encourage solo and small-firm practitioners to serve near-poor and moderate-income clients, might also help currently underemployed attorneys acquire useful skills while aiding these clients.)<sup>127</sup>

A number of other innovative legal services delivery methods and financing arrangements have also been developed over the past 15 years. Some of these approaches appear to have the potential to increase access to quality legal services for some people who need such services but cannot afford to pay for them, in full or in part. Ideas include prepaid legal services plans, alternative dispute resolution, delegalization, the use of trained paraprofessionals, the small claims court model, and unbundled legal services.

Other methods, particularly pro per coaching and peer counselling, must be considered stop-gap measures at this time. They should be used with great caution with the hope that eventually more adequate representation becomes available.

One additional facet of American justice should be acknowledged here: contingent fee cases, an important part of our system as it exists today. Representation based on a contingent fee can provide access to justice for many people. In areas such as personal injury, health care costs, insurance problems, housing discrimination, discrimination in hiring, discrimination on the job, and working

condition problems, contingent fee suits may present options that would otherwise be unavailable to the poor, near-poor, and people of moderate means. This report, however, focuses on non-contingent fee access to legal services for the poor, those cases where significant monetary recoveries are normally not involved.

**Prepaid Legal Services** – Currently, 85 million Americans are covered by some form of group or prepaid legal plan, an increase of six million since 1993.<sup>128</sup> Most of these plans offer very limited coverage, however. They typically provide some free, short-term consultation, often over the telephone, and refer cases requiring any research or representation to a panel of private lawyers who may offer discounted fees.

- Less than ten million people nationwide participate in pre-paid programs providing comprehensive services to their members. The United Auto Workers union sponsors the largest of these programs. The UAW program employs nearly 500 salaried lawyers and also contracts with private law firms to furnish legal services to nearly one million beneficiaries in plants across the country. This is a major program in several midwestern states, but only affects a few thousand auto workers in California.<sup>129</sup>
- In 1993 the State of California's 88,000 eligible employees were enrolled in a group legal services plan administered by a large national provider, Midwest Legal Services. This plan, for which employees in 1995 paid \$9.07 per month for individual coverage and \$16.50 for the family plan, offers a narrow range of services for the premium dollar. The plan pays attorneys' fees for covered services, including adoption, bankruptcy, consumer protection, divorce and custody, real estate, wills and trusts, and misdemeanor criminal defense except for drunk driving. Fees are paid in full if the member uses a network attorney and are reimbursed at \$60 per hour (up to a published maximum for each service) if the member chooses to use an outside attorney. The plan has member attorneys in most major California cities, including 37 in San Francisco and 40 in Sacramento.<sup>130</sup>
- Other typical but much more limited programs are employer-sponsored Employee Assistance Plans. EAPs are directed at keeping employees working and productive. They focus on counseling and treatment for substance abuse and mental health problems, but since these problems often cause related legal problems, many EAPs now include legal consultation and referral as a benefit. Some 25 million people are insured through EAPs and other employer-sponsored plans.<sup>131</sup>

The scope and quality of services provided by existing prepaid plans vary widely. From an access to justice perspective, the most promising plans are those which offer comprehensive services in exchange for a reasonable premium. Using the same financing mechanism as health insurance, a comprehensive prepaid plan spreads the cost of expensive yet infrequent and largely unpredictable legal events over the premium payer's lifetime. Prepaid legal services is a viable option only for those who can afford to pay the premiums; thus, is not an answer for the poor or near-poor. Nonetheless, a prepaid legal insurance program may offer middle-income people the possibility of obtaining access to quality legal services at a cost they can reasonably afford, especially when combined with an efficient delivery system like the UAW plan.

After years of limited marketing success, prepaid plans are now gaining increased acceptance. It similarly took a long time for the public to view health insurance coverage as essential. Large non-profits like Blue Cross/Blue Shield and the Kaiser Foundation HMO spearheaded this major development in the health care field. It may be time to consider creating some similar organization(s) in the

legal services field. At a minimum, we should experiment with and evaluate comprehensive prepaid legal insurance vehicles for legal representation to middle class Californians.

**Court-Affiliated ADR** – Currently, the justice system is experimenting with various forms of alternative dispute resolution that are affiliated with local courts. Under such programs, issues are resolved by people who are not judges or juries and who often use a different dispute resolution process. Court-annexed arbitration, attorney settlement officer programs, and child custody mediation are all examples of such methods.

To date, however, there is no evidence suggesting that existing court-affiliated ADR forums make it possible for litigants to proceed effectively without lawyers. This is the case in both ADR forums and in the court procedures which occur before and after the case goes to arbitration, mediation, settlement, etc.

Efforts are underway in some parts of the United States to design new court procedures offering litigants a variety of dispute resolution tracks with access to justice as the prime consideration. The goal is to create a process for one or more of these tracks to function entirely without the assistance of lawyers or with the assistance of trained lay advocates.

- The “**multi-door courthouse**” model, operating on an experimental basis in a few communities, has some of these attributes. However, at present these multi-door courthouses can only offer a variety of dispute resolution approaches, many of which require lawyers for effective participation. Parties unable to afford counsel cannot compel their represented opponents to use an approach in which neither side can have a lawyer.

**Independent Alternative Forums** – Some disputes, such as those over child custody, are being removed from the courts to separate governmental forums. As new forums are developed, one issue that arises is whether they can be designed to be fair to the unrepresented, or whether lawyers or some sort of advocate should be provided for those who cannot afford to provide their own.

There are also other forums for resolving disputes that have not been filed in the courts. These are outside and independent of the courts and most are privately funded. One example is labor-management grievance arbitration. Another is arbitration conducted by for-profit and non-profit providers of dispute resolution services, such as the American Arbitration Association. Most of these forums, however, are not designed to function well unless both parties are represented by lawyers.

A few independent forums are specifically designed to operate without legal representation at no cost or limited cost to the parties. They tend to focus on interpersonal, community, product, and/or low-monetary value disputes. The Better Business Bureau, for example, operates a program that covers a wide range of services.

- A broad spectrum of minor disputes can be resolved at Neighborhood Justice Centers, some of which receive public funding. (In California, these centers are often called **Community-Based Dispute Resolution Centers**.) Each center decides which methods of mediation to offer. Sometimes this includes a hybrid of mediation and arbitration called “med-arb,” where parties agree to mediation if it works and to arbitration as a last resort. In California, some centers and courts have arrangements for some case referral.

Centers generally try to get people with disputes to talk directly with one another to foster full understanding of each other’s concerns. Each center



sets its own policy on whether to allow consultation with or representation by a lawyer or trained advocate.

Community-Based Dispute Resolution Center services are typically free and use trained volunteers to handle most cases, which include consumer, landlord-tenant, domestic, family law, public policy, and victim-offender disputes, as well as neighborhood controversies. They also work in schools with young people. Such centers may be most effective in resolving disputes where power and interests are relatively evenly balanced. Because mediation relies on voluntary participation, it is often difficult to bring more powerful parties to the mediation table.<sup>132</sup>

**Delegalization** – Efforts to “delegalize” the justice system currently involve two major approaches: (1) to make the law and legal processes as they now exist more accessible to litigants; and (2) to simplify the law by making the substantive law easier to understand and manipulate.

Self-help books and computer software designed to make law more accessible are appearing in record numbers. These tools help litigants create simple legal instruments and handle simple, uncontested matters themselves.

- For example, three Arizona trial courts have begun offering citizens access to “**Quick Court**,” a computer loaded with software which people can use to generate all the pleadings required for an uncontested divorce or forcible detainer. The computer has a large screen and asks the user a series of questions in either English or Spanish. It computes and prints out a set of pleadings, based on the responses given, that the litigant can take to the clerk’s desk and file.

“Quick Court” is currently being evaluated and plans are underway to expand it to handle probate and small claims matters, as well as the payment of traffic fines. To date, it appears such tools can help increase access, but only when they are used by fairly well educated people with relatively simple legal problems.<sup>133</sup>

Efforts to simplify the law include attempts to redraft legal language into “plain English” that all litigants can easily understand. Most laws can probably be written more clearly, but the number and complexity of our laws makes it doubtful that most litigants will completely understand the rewritten laws.

Another approach to simplification of the law is to reduce the number of factors considered when deciding certain types of disputes.

- Divorce is an example of one area that has already benefitted from such simplification. Parties are no longer required to prove who is at fault before obtaining a divorce since the creation of no-fault divorce proceedings. Divorce cases are now often simpler and less expensive than they were before this change, at least when custody and support are not major issues.

A third form of legal simplification involves resolving disputes without relying on the complex web of laws and procedures used in court. This may be done in mediation, for example. There, the mediator helps the parties come up with the compromise which satisfies them best. The result may be independent of what they might have been entitled to in court.

**Use of Paraprofessionals** – Lawyers are not necessary to resolve all legal disputes. Trained paraprofessionals and self-help manuals, for example, have been used by legal services programs in appropriate contexts, such as uncontested divorces, to stretch their scarce resources. Mediation programs are also being developed to

focus on disputes in areas that often involve middle-income or poor people. These approaches should be expanded and improved.

Other models exist in non-judicial forums in which both sides are represented by less costly paraprofessional advocates.

- A good example is a **welfare hearing** where the recipient is represented by a trained lay advocate working for a legal services organization. The welfare agency is represented by a case worker or an individual who specializes in presenting cases at these hearings. The advocates on each side have roughly equivalent knowledge, training, and skills within the specialized field of welfare law. Thus, there is a good chance the objectively stronger case will carry the day.

The expanded use of trained paraprofessionals should be encouraged when such use results in increased access to justice. It will be important to ensure, however, that clients are not at a disadvantage because they rely on such assistance instead of that of a lawyer.

**Small Claims Court** – The small claims court has been in existence for nearly a century. The intent of the court is to provide justice in small cases by using a simplified process and by eliminating the use of lawyers. In California, small claims courts handle disputes valued up to \$5,000. In an idealized small claims court model, the process is inquisitorial, rather than adversarial, with the judge playing an active role. In theory, the judge uncovers the relevant facts and legal principles that the litigants' attorneys would supply in the regular courts.

Because of the judge's pivotal role in the proceedings, a competent, active judge is necessary in small claims court. Passive judges, untrained pro tems, and unprepared litigants all threaten the quality of justice dispensed. Businesses that appear frequently using highly trained personnel also affect the balance of power in this court.

To help parties use the court effectively, each county is required to make free individual assistance available to advise small claims litigants and potential litigants. Counties determine the characteristics of these advisory services according to local needs and conditions, but all must provide advice in person, by telephone, or by other helpful means. Counties with few small claims filings may exempt themselves from the advisory requirement, but they are still required to provide general recorded or published information.<sup>134</sup> Working with such an advisor gives poor people, who otherwise would have no access to legal counsel, a better chance at representing themselves in disputes with businesses, individuals, and institutions.

- While no formal studies on the efficacy of small claims court advisor programs have been conducted in California, evidence about their extensive use abounds. McGeorge School of Law's Small Claims Advisors Clinic provides walk-in and telephone advice to an average of 2,000 litigants in 11 counties each month. It is supervised by two attorneys and staffed by over 100 students during the academic year.<sup>135</sup> San Francisco's Small Claims Court Advisor's Office sees about 5,000 people each year and a half-time assistant advisor annually speaks with another 5,000 over the telephone. Supervised law students and other interns also help potential litigants.<sup>136</sup>

Advisors listen to people's problems and may give them a cost-benefit analysis to see whether it is worthwhile to pursue their claim. Advisors help prepare those who want to file a suit to represent themselves in court and to collect their judgments. In addition, they often refer many other people (pre-filing) to alternative dispute resolution, community and government agencies, and lawyer referral

services. Telephone recordings are another common method of providing additional referral information.

The results of such efforts, advisors say, illustrate the need for expanded programs and additional resources.

- For example, with the San Francisco Advisor's assistance, an elderly woman who speaks little English was able to collect \$951 from a bank that had charged her improper fees.

**Assisting Unrepresented and Partially Represented Litigants** – The equal justice goal is to provide counsel for those who cannot afford to pay for it, especially in matters where the other party is represented by a lawyer. Until the elusive goal of “equal access to justice” can be fully met, it is important that a number of strategies continue to be studied, developed, and refined to provide at least some assistance to those litigants who otherwise would be completely unrepresented.

Some of these strategies may be able to help a small number of litigants to get the justice they deserve. These will generally be better educated people with less complex or minor disputes. However, none of these approaches can solve the access problem and some run a risk of raising false hopes while the benefits they confer may be limited. Therefore, programs should be analyzed on an ongoing basis to assure that real access to justice is the result.

The number of unrepresented litigants in California courts is increasing dramatically. Concern is also growing about their inability to represent themselves effectively and the steps an overburdened justice system can and should take to assist them.

**Pro Per Coaching** – A 1992 National Center for State Courts study found that neither party was represented in half the divorces filed that year in Alameda and San Diego counties. Justice Donald King of the state's First District Court of Appeal estimates that at least one of the parties is unrepresented in perhaps two-thirds of the 170,000 divorces filed in California each year.<sup>137</sup>

Judges who see these litigants in their courts in ever larger numbers are expressing their concerns. In a May 1994 interview in *California Lawyer* magazine, Alameda County Superior Court Judge Roderic Duncan (now retired), who had at that time supervised the family law department for seven years, said pro per filers “make horrible mistakes in the way they present their cases in court.”<sup>138</sup>

- Responding to this situation on the local level, Judge Duncan recruited students from four Bay Area law schools to be present in his courtroom one day each week to help people without lawyers navigate through family law court.
- The **Bar Association of San Francisco** also has an ambitious volunteer program for family court matters. It has been able to provide full representation in family court to some 8,000 people per year. With a supervising attorney and a corps of experienced volunteers, the BASF program has trained 1,000 pro bono attorneys to handle these cases.<sup>139</sup>

The experience of pro per litigants in California's family courts has been much studied by both the judiciary and the private bar. As illustrated here, the pro per situation provides an opportunity for productive collaborative efforts between the bench and bar.

As funding levels have decreased, an increasing number of legal services providers have also begun to offer pro per coaching to their poor clients as a low-cost, though inadequate, substitute for full-scale representation. Legal

services offices provide an attorney who coaches a group of clients on how to represent themselves during a court proceeding or an administrative hearing. The clients, who are facing a similar legal issue such as eviction, attend a clinic where applicable laws, court procedures, and legal forms are reviewed. After this initial session, the clients are on their own to represent their interests as best as they can.

Pro per assistance may be effective in simple, uncontested cases and while the availability of legal counsel would normally be preferable, there are situations where pro per litigants can be successful if they are well informed. However, where the opposing side has counsel, it will be extremely difficult for the party appearing in pro per to attain justice, even when he or she has been well coached. In such contested situations, pro per coaching and representation must be considered stop-gap measures only.

An empirical study conducted in New York City showed that tenants who were represented by lawyers in eviction cases almost always won, while those who were unrepresented almost always lost.<sup>140</sup> As pro per coaching efforts continue, studies must be conducted to assess the impact of these programs on the ability of low-income litigants to enforce their rights.

**Peer Counseling** – Another form of in pro per representation that should be evaluated for its impact on the ability of low- and moderate-income clients to enforce their rights is sometimes referred to as “peer counseling.”

- In some areas of California, for example, tenants organizations train their own members to serve as peer counselors, helping other members represent themselves in landlord-tenant cases. In other places, women’s groups offer peer counseling for their members on how to handle domestic violence issues in court.

In both instances, the peer counselor remains available to provide advice and answer questions throughout the process, sometimes even accompanying the litigant to court. The efficacy of this model should also be evaluated, both on its own and in comparison with pro per coaching.

**Unbundled Legal Services** – Another innovative response to the lack of adequate funding for legal representation is so-called “unbundled” legal services. Under this approach, a lawyer and a client agree to divide up tasks and each is responsible for handling discrete parts of the case. Many educated clients who are not necessarily poor prefer this method of interacting with an attorney, thereby saving themselves money and taking a more active role in their legal affairs. For example, the client might do research and the lawyer could go to court. California is particularly fortunate to have many of the national leaders in the field of unbundled services working in the state.

The ABA’s *Final Report on the Implications of the Comprehensive Legal Needs Study* recommended that attorneys be more flexible, offering discrete services as an affordable alternative to complete representation. The report also cautions that both lawyers and clients need to be educated about the benefits and pitfalls, and that there are special considerations which need to be addressed when dealing with a poor client who has no option but to accept partial representation.<sup>141</sup>

- One Connecticut lawyer has developed an unbundling model, called “Court Coach,” based on the idea that lawyers can successfully coach clients to represent themselves in court. She is putting together a national network of attorneys she licenses who use this model.<sup>142</sup> There are many attorneys in California also offering their services in this manner.

One result of such coaching could be a lower bill for a client. For example, an attorney might bill a client seeking a change in child support for less than two hours (rather than six hours) if the lawyer spends the time training the client to represent him/herself in court.<sup>143</sup>

It should also be noted, though, that professional conduct and liability issues must be considered before unbundled legal services (also called “discrete task representation”) should be offered to clients. Under the comments to Rule 3-400 of California’s Rules of Professional Conduct, unbundling raises the issue of whether an attorney has “reasonably limited” the scope of representation.<sup>144</sup> To the extent that a person participating in unbundled services goes into court alone, the Access to Justice Working Group has serious doubts that even a well-educated, well-coached litigant can obtain justice when appearing in court against a lawyer representing the other side. However, where an attorney makes necessary court appearances and works closely with the litigant, discrete task representation can be effective and has the potential for making lawyers much more affordable for thousands of near-poor and middle-income Californians.

### **Need for Expanded Public Education**

In order to exercise their basic rights and responsibilities under the law, Californians need to understand them. People need to understand both the basic structure of the American legal system and methods of accessing it. They also need to know how to find a lawyer when they need one, where to find a lawyer to represent them without cost or at a fee they can afford, and what alternatives to legal representation might be available to resolve their disputes.

The Access to Justice Working Group recognizes it can be a cruel hoax to educate low- and moderate-income people about rights unless they are afforded the means of enforcing those rights. Furthermore, it serves little purpose to refer these people to offices and resources that are so overwhelmed they cannot serve more clients. Any expansion of public education programs should be accompanied by an expansion of legal services and dispute resolution resources. Such public education campaigns should also emphasize the crucial link between the provision of free or low-cost legal services and access to justice.

According to the American Bar Association’s *Comprehensive Legal Needs Study*, many Americans are unaware of the legal resources in their own communities. While moderate-income people are slightly more aware of legal resources than the poor are, only 21% of the 1,305 households surveyed had heard of mediation services, 50% were aware of lawyer referral services, 53% knew about free legal services, and 80% were familiar with the small claims court.<sup>145</sup>

- Traditional public education tools include pamphlets, self-help books, public service announcements, and Tel-Law’s pre-recorded audio tapes on a variety of legal issues and services.

While the substance of the materials themselves may be helpful, a number of impediments to their widespread use exist. Many users lack fluency in English and do not read at the grade level for which the materials are written. Other problems may include cultural barriers to listening to tape-recorded messages, an inability to ask questions to check understanding or to find out how a broad principle applies to a particular case, and a lack of knowledge that these materials exist and/or where to find them. It is important to evaluate how to make these existing materials more useful, including how to get them to low- and moderate-income people who need them.

- Recent innovations in public education information include interactive video, 900 telephone numbers operated for profit by the private bar, and legal kiosks, some staffed by knowledgeable individuals.

On the surface, these methods of public education are intriguing because they provide interaction between the disputant and a computer program or a trained person. Monitoring and evaluation of these models, including whether and how they should be integrated with more traditional public education techniques, is important before their use becomes widespread.

A variety of other proposed public education strategies should also be considered for the future. A statewide hotline that provides advice and referral for low- and/or moderate-income clients on common legal issues should be considered. Perhaps basic information about how to find free or low-cost legal representation could be printed on the court summons. Designing a preventive law program for low- and moderate-income people that emphasizes the benefits of dealing with legal issues before they reach a crisis is another option to study. These and other public education techniques need to be evaluated. A wealth of information about preventive law strategies already exists in California as the state is home to national pioneers in the field. Any efforts should include consulting such experts.

*Carol Wilson called Monterey County Legal Services because her son needed surgery and she had been waiting more than three months for Medi-Cal approval. During that time, her son had several emergencies caused by bad reactions to medication he was taking while waiting for surgery. He was falling behind at school and was placed in a special class. Mrs. Wilson was reluctant to bother the doctor because he was one of the few in the area who took Medi-Cal. The legal services office contacted Medi-Cal and found out that the necessary form had never been submitted. Authorization was expedited, and the boy received the surgery.*

# 7.

## Estimating the Gap between Current and Necessary Funding for the Poor and Near-Poor

The long-range task for those who will shape the future of legal services in California is to develop a vision for meeting this nation's commitment to justice for all. The Access to Justice Working Group's vision is of a time in the not too distant future when poor Californians and the legally indigent will have the funded right to meaningful access to quality justice when they need it. To fulfill this vision will require funding far in excess of the \$100 million spent in 1993 on some of the civil legal needs of about one-quarter of the state's poor population.<sup>146</sup>

This section of the report will deal with estimating the funding level necessary to achieve access to justice for the poor and near-poor only. It is crucial to establish greater funding for these people so they can receive free or partially subsidized legal aid. People of moderate incomes can afford some level of representation and the enormous size of this group makes it impossible to shift the costs to another segment of society. Therefore, attaining justice for them is more a matter of structural change to the legal system than finding additional money to provide services.

The following attempt to calculate the gap between the amount of legal services now provided and the level of services envisioned by this report must be viewed as a conservative *educated estimate*. The actual amount will be affected by a myriad of factors, some of which cannot be foreseen and few of which can be controlled. They include the growth of population and poverty, changes in economic indicators, the development of less costly models for the delivery of quality legal services, and the delegalization and de-bureaucratization of the web of laws and agencies that regulate the poor. Funding equal justice for poor and legally indigent Californians may thus cost more or less than the estimate. Defining a precise amount, though, is not nearly as important as developing a working estimate that can serve as both an immediate and a long-term goal.

It is important to note at the outset that the Working Group's estimates are based on federal funding and legal needs figures from 1993. The significant FY 1996 reductions in federal spending on legal services and other federal programs aiding low-income Americans would greatly increase the estimates contained in the report. (See Table 8 for information on 1996 funding reductions.) The Working Group used the 1993 figures because they were the most complete figures available and because at the time of publication, the Congressional proposals for either elimination of or drastic reductions in legal services funding were still in flux. In 1996, California's funding was reduced by around \$17 million.

*"The real practical blessing of our Bill of Rights is in its provision. . . securing a fair hearing by independent courts to each individual. . . but if the individual in seeking to protect himself is without money. . . , the Constitution and the procedure made inviolable by it do not practically work for the equal benefit of all. Something must be devised by which everyone, however lowly and however poor, however unable by his means to employ a lawyer. . . , shall be furnished the opportunity to set fixed machinery of justice going."*

*—William Howard Taft, 1926  
Chief Justice of the  
U.S. Supreme Court*

## The Poor

### A Working Estimate

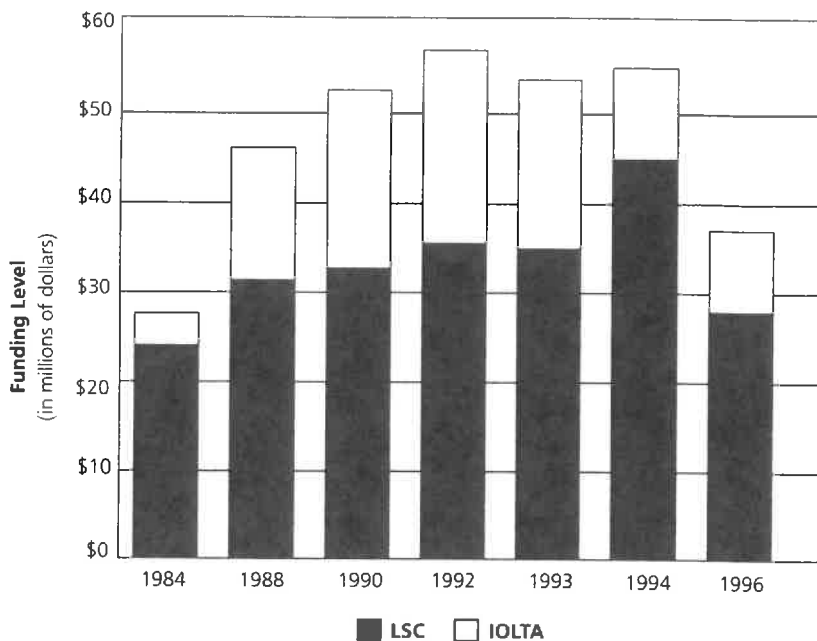
Using cost per case figures is a credible and easily comprehensible method of estimating cost that is widely used in both the public and private sectors.

In 1993, California's 121 legal services programs received funding from all sources totalling around \$100 million dollars.<sup>117</sup> In the same year, these programs closed approximately 500,000 cases, providing full representation to some clients and minimal assistance to others. Recognizing that in many, if not most, closed cases the clients' legal needs are not fully met, we will use this number as a *conservative* estimate of currently met need. Dividing the amount of dollars spent by the number of clients served gives an average cost per case of \$202.

The second part of the calculation involves subtracting the amount of fully or partially met legal need (almost 500,000 instances in 1993) from the total estimated need (almost 1.8 million). The difference represents almost 1.3 million (1,276,248) *unmet* legal needs.

By multiplying the number of unmet legal needs by the average cost per case of \$202, we arrive at an estimate of the additional money needed to fill the currently unmet civil legal needs of California's poor residents. This result is almost \$260 million. If we add the \$260 million to the \$100 million invested in 1993, we contemplate a total annual cost of approximately \$360 million (in 1993 dollars) to meet California's unmet need. Federal funding cuts and the decrease in IOLTA money between 1993 and 1996 have resulted in a combined reduction of around \$17.7 million in funding for California, however. There are also proposals in Congress for eliminating California's remaining \$28 million in federal funding entirely for 1997. Thus, the additional cost of meeting the poor's unmet legal needs in 1997 will be even higher than \$260 million.

Table 8. Reductions in Funding for Legal Services.<sup>1</sup>



1. Total dollars, not accounting for inflation

Source: Data from the Legal Services Corporation and the State Bar of California Legal Services Trust Fund Program.



A number of caveats must be noted about this estimate. First, using the concept of cost per case could skew the estimate somewhat. For example, the cost per case estimate may be low because it does not account for the fact that most legal services are provided in urban areas where costs are higher than in rural areas. Accounting for this factor would thus increase the total funding estimate.

In addition, as noted above, assuming about one-quarter of current need is being met is overly optimistic. Many cases that now receive brief service deserve fuller representation if meaningful access to justice is to be provided. This factor would increase the cost per case and the overall estimate.

Third, the estimate assumes that all 1.8 million poor households who had legal needs in a given year would seek legal assistance. It also assumes that all of their needs are truly legal and are ones that, in keeping with the spirit of equal access to justice, should be met. However, some poor people would choose not to use the justice system and some of their needs would turn out to require non-legal assistance. This factor would thus decrease the funding estimate.

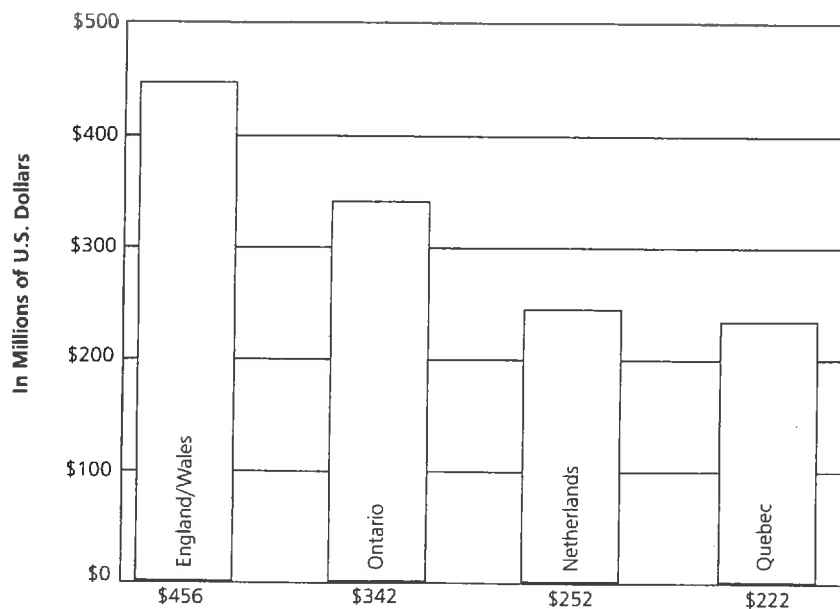
Finally, while the majority of the one million hours of legal services provided by pro bono attorneys are included within the 500,000 reported cases, some cases handled by attorneys who are not affiliated with one of the state's organized pro bono programs are not included. If these cases could be counted, the Working Group assumes they would increase slightly the amount of need met. Another unknown factor may be the number of cases handled as contingent fee matters. Both of these factors would decrease the overall estimate of the funding gap.

### Looking at the Gap in Context

The Access to Justice Working Group's estimate of \$360 million is a large number. To evaluate it effectively, it needs to be put in context. Several comparisons are helpful in doing so.

**Comparisons with Western Democracies** — If civil legal services for the poor in California were funded at the level now provided in England and Wales, the annual

**Table 9. California Investment Needed to Match Investments in Civil Legal Services by Nations with Similar Legal Systems.**



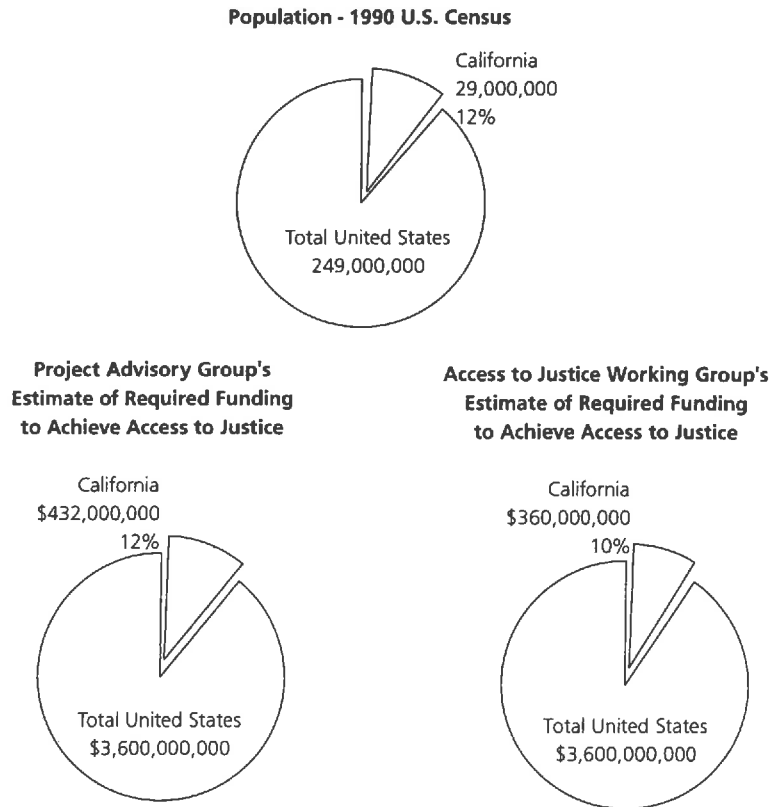
Source: Data from Earl Johnson, Jr., *Toward Equal Justice: Where the United States Stands Two Decades Later*.

cost would be approximately \$430 million. Funding California at the level now provided in Ontario, Canada would cost around \$315 million. Funding at the average level European nations (England, Wales, the Netherlands) and Canadian provinces (Ontario, Quebec) with justice systems similar to ours do would cost approximately \$290 million a year. These comparative figures show the conservative estimate of \$360 million falls well within the range it would cost to provide a level of access to legal services substantially similar to that provided by other Western democracies.<sup>148</sup> (See Table 9.)

**Comparison with National Funding Goals** – In 1994, the Project Advisory Group (PAG), which represents LSC recipient programs, advised the LSC Board of Directors that providing equal justice for people in poverty on a national level would cost at least \$3.6 billion a year.<sup>149</sup> PAG defined “equal justice” to mean a time when Americans with the least income will be able to utilize the legal system on the same terms as those who can afford legal counsel. According to the 1990 census, California’s population of 29 million comprised about 12% of the total U.S. population of 249 million.<sup>150</sup> Twelve per cent of the PAG estimate is \$432 million. This is thus their figure for the annual cost of full funding for civil legal services in California. In comparison, the Access to Justice Working Group’s estimate of \$360 million seems rather conservative. (See Table 10.)

**Comparison with Health Care Costs** – On a national scale, the public investment in health care for the poor represents about 15% of total public-private expenditures on health care. In contrast, the public investment in legal services for the poor represents less than one per cent of the total public-private expenditures on legal services in this state.<sup>151</sup>

**Table 10. Comparison between California and the United States: Population and Funding Levels.**



In 1990, California spent \$6.8 billion to provide health care for the poor through its Medi-Cal program.<sup>152</sup> (In contrast, the state itself does not provide funding for legal services.) The \$100 million from all sources spent in California in 1993 to provide access to justice for the poor is less than two per cent of the amount spent on medical care for the state's indigent. The \$360 million estimate is still an extremely modest six per cent of that medical care total.

**Comparison with Court Costs** – California currently spends \$1.7 billion annually on the state's court system.<sup>153</sup> If it were to spend even 20% of that amount, or \$340 million, on civil legal services for low-income people, California could close the gap between present funding levels and the estimated need of the state's almost six million poor people. England's civil legal services budget, in contrast, is nearly as large as its judicial budget. A similar level of appropriation in California thus seems both just and defensible.

It is possible and appropriate to vigorously debate the accuracy of the assumptions and calculations behind the Access to Justice Working Group's estimate. However, no matter what the best approximation may be, it remains undebatable that the legal needs of California's poor are vastly underserved, and that access to justice for the poor will cost in the range of \$360 million a year, or \$260 million more than was spent in 1993.

## **The Near-Poor**

The estimate developed above to meet California's unmet need only accounts for the legal needs of the poor, those living below 125% of the poverty level. It does not address the needs of the near-poor living in the state. Many, if not most, of these people require reduced fees or partial subsidies if their pressing legal needs are to be addressed.

To calculate the cost to provide subsidies to meet the legal needs of the near-poor, the Access to Justice Working Group used the estimate of around 800,000 unmet legal needs for this demographic group that was developed in Chapter 4.<sup>154</sup> (This number reflected legal incidence data generated by the CLNS.) Any cost estimates, however, are only very general approximations since sliding scale fees would be charged for legal services to the near-poor.

Assuming an average cost of \$202 per case, the cost to fully meet the near-poor's unmet needs would be approximately \$165 million.<sup>155</sup> The Working Group used the same cost per case figure as was used above in the estimates of the cost of providing access to justice to the poor.

### **Sliding Scale Fees**

Subsidizing the cost of legal services for near-poor Californians would mean requiring clients to pay a certain percentage of the fee on an income-based sliding scale and funding the remainder of the cost. Providing an average ten per cent subsidy would cost around \$15 million. If an average 50% subsidy were provided, it would cost approximately \$80 million.<sup>156</sup>

## **Public Support for Bridging the Gap**

Short-term politics aside, there are reasons to believe that justice for all is a feasible goal. Several polls conducted over the past fifteen years demonstrate that the American public is willing to invest more tax dollars to fully realize this goal.

In 1978, for example, the National Center for State Courts commissioned a national public opinion poll that asked Americans which elements of the jus-

tice/law enforcement system they preferred to spend their taxes on. Court improvements did not prove very popular, but spending more money to provide “lawyers to those who cannot afford their own” was. It garnered the second highest vote (71%) of the dozen possibilities. Significantly, this got twice the support of providing more money for police or prisons.<sup>157</sup>

In 1981, shortly after President Reagan took office, the *New York Times* conducted a national poll aimed at gauging public support for a spectrum of basic national programs, including education, welfare, urban aid, etc. In this poll, legal services for the poor came in second (81%), right behind national defense, as the program most deserving of funding.<sup>158</sup>

In 1992, the California Vision 2020 project began a study to look at the future of the state’s justice system. As part of the effort, the project commissioned a survey of the general public, lawyers, and other professionals within the justice system. One of the only areas of agreement among all groups surveyed was that unequal treatment of the poor plagued the system and needed to be addressed.<sup>159</sup>

In 1995, the State Bar of California’s Commission on the Future of the Legal Profession and the State Bar issued their final report, which recognized the tremendous gap between the legal needs of California’s poor and currently available funding. The report called on the legal profession to exert leadership in seeking an adequate and secure financial base for indigent and moderate-income legal services. It also urged the profession to consider working to establish a right to counsel in certain civil cases where basic human needs are involved.<sup>160</sup>

# **AND JUSTICE FOR ALL**

## **PART TWO**

**Findings, Recommendations,  
and Funding Options**



## Working Group's Findings

Two things are abundantly clear if we look back over the past century at California's efforts to provide access to justice for all its people. First, those few dedicated professionals in legal services programs and the many private attorneys who are currently committed to providing civil legal services to the poor have made and continue to make an outstanding contribution toward the goal of justice for all.

Second, adequate representation remains an unfulfilled promise for the vast majority of poor and near-poor Californians, as well as for many moderate-income citizens. Our efforts have *never* been enough, or even close to enough. Sadly, we are farther from the goal of equal justice today than we were twenty years ago.

Looking forward, we need to have the courage to dream and plan effectively for the future. California's government must accept the provision of legal representation to those unable to afford their own as a public responsibility. Every day that passes while this goal languishes makes a mockery of those fine words above the entrance to the U.S. Supreme Court.

We must find creative ways to channel *substantially* more funding into legal services for the poor and into creating subsidized programs for the near-poor. We must experiment with and evaluate alternative ways to provide quality justice for the poor, the near-poor and the middle class. We must broaden responsibility and accountability for the goal of access to justice from the legal profession to the leadership of California in both the private and public sectors. We must set aside short-term politics and economics in favor of a long-term goal that we can meet in mid-range and short-term increments.

### Finding 1. Fundamental Right

Access to justice is a fundamental and essential right in a democratic society. It is the responsibility of government to ensure that all of its people enjoy this right, that there is indeed "equal justice under law."

### Finding 2. Importance of Legal Representation

In most parts of our civil justice system, access to justice requires that lawyers represent both parties. As a practical matter, in most cases there can be no access to justice without access to lawyers. Thus, those unable to afford counsel cannot receive justice unless they are provided lawyers for their cases. Society cannot claim to offer "equal justice under law" unless it supplies free (or partially subsidized) lawyers to those who cannot afford counsel.

### Finding 3. Counsel as Necessary as Courts

Government does not fulfill its obligation merely by providing judges, courts, and other means of dispute resolution. Lawyers are an equally essential element of the process. Consequently, in order to guarantee an opportunity for justice in

*"The legal profession owes it to itself that wrongs do not go without a remedy because the injured has no advocate. . . . Does the lawyer ask, 'Who is my neighbor?' I answer, 'The poor man deprived of his just dues.'"*

*—Charles Evans Hughes, 1920  
ABA President, later  
U.S. Supreme Court Justice*

civil cases, government has just as great a responsibility to ensure adequate counsel is provided for those who are unable to employ privately-paid lawyers as it does to supply judges and courthouses in those cases.

#### **Finding 4. Counsel Guaranteed in Other Countries**

The governments of most industrial democracies other than the U.S. already guarantee low-income people the assistance of free lawyers in civil cases either as a matter of statutory or constitutional right. A few of these countries, such as Italy and Spain, implement this right through mandatory pro bono programs requiring lawyers to supply this representation without compensation. The majority of countries – England, France, Germany, the Netherlands, the Scandinavian countries, and Canadian provinces, among others – have discarded the mandatory pro bono approach as unfair to clients as well as lawyers. Instead they provide a model for government funding of civil legal services for the poor, i.e., they fund the lawyers who implement the right to counsel by representing lower-income people.

#### **Finding 5. Higher Contributions in Other Countries**

In the majority of industrial democracies which fund legal representation for lower-income citizens, this budget item has a much higher priority than it does in the U.S., or in California, where tax-generated revenues are not used at all for such services. These countries spend twice to seven times more per capita than U.S. jurisdictions (including California) on civil representation for those unable to afford their own lawyers.

#### **Finding 6. Unmet Legal Needs of the Poor**

The need for civil legal assistance among low-income Californians far exceeds the current level of resources provided through government, private charity, and other sources. As of 1990, income levels in almost two million California households, including almost five million people, were below 125% of federal poverty thresholds. As of 1993, the legal needs of approximately three-quarters of poor people were not met at all. The legal needs of the remaining one-quarter of the indigent population were sometimes met only partially. Funding for civil legal services must be increased dramatically in order to implement a right to justice for low-income Californians. The Working Group's best estimate is that it will require an additional \$250 to \$300 million (in 1993 dollars) to fill the gap between present levels of funding and the level required to provide justice to the poor in California, whose numbers had risen to almost six million by 1993.

#### **Finding 7. Subsidized Services for the Near-Poor**

Over two million additional households in California (representing over six million people) lived above 125% of the poverty level in 1990, but earned under \$27,500 per year, barely maintaining a minimum standard of living. Many of these families are unable to afford legal services for pressing needs without some form of legal assistance. As the legal services delivery system evolves, consideration must be given to providing some level of subsidized legal services to ensure meaningful access to justice for the near-poor. The Working Group's estimates for the cost of providing such partially subsidized services range from approximately \$15 million [with a narrow definition of the near-poor and a low subsidy percentage] to \$140 million [with a broader definition of the near-poor and a higher subsidy percentage]. (All calculations are in 1993 dollars.) Such subsidized services must begin even before the needs of the poor are completely satisfied.



**Finding 8. Assistance for the Moderate-Income**

Another almost 2.5 million California households (representing almost seven million people) comprise the middle fifth (the third quintile) of the state's population. These people have annual household incomes between \$27,500 and \$45,000. While they seek legal assistance somewhat more often than the poor and near-poor, people with moderate incomes are still unable to afford representation in many instances, resulting in harm and injustice to their families. Innovative methods of financing and delivering legal services to people of moderate means must be developed, tested, and evaluated, with the goal of making quality legal services more widely available at a more affordable cost.

**Finding 9. Pro Bono**

The experience in other countries and in the U.S. demonstrates that the private bar, acting on its own, cannot and should not be called upon to provide full representation for California's civil indigent. However, California lawyers, who provide one million pro bono hours a year, should be recognized for their outstanding contribution. At the same time, more California lawyers – acting individually and collectively – can and should provide additional pro bono services and/or financial contributions to legal services programs on an ongoing basis.

**Finding 10. ADR and Law Simplification**

Increased funding for legal representation is the most important but not the only approach to giving lower-income Californians access to civil justice. Innovative methods of dispute resolution present promising possibilities for addressing certain problems without lawyers yet assuring quality justice for the poor, near-poor and middle class. It may also be possible to simplify the substantive law in certain areas so that lawyers – now essential to deal with some problems – become less necessary. At the same time, it is critical that society ensures that these measures actually deliver on their promises and do not deny justice to the unrepresented. This will require the creation of a mechanism capable of designing, establishing, and evaluating experimental programs for their impact on access to quality justice on an ongoing basis.

**Finding 11. Burden on the Justice System**

The absence of representation not only disadvantages the litigant, but also burdens other participants in the justice system. Courts must often provide information about procedural requirements or substantive rules and assist pro per parties in other ways. Such efforts are a burden on the court's time, and can delay other matters. In addition, attempts to respond to the needs of unrepresented litigants may come into conflict with the requirement that the court's relationship to opposing parties remain impartial. More fundamentally, it detracts from public confidence in the justice system when the financial situation of a party is more likely than the merits of an issue to determine the outcome.

**Finding 12. Societal Obligation**

Achieving access to civil justice as a matter of right will require the honest commitment and ongoing attention not just of lawyers, but also of a broad spectrum of California's public and private sector leaders. The legal profession should provide initial leadership by calling attention to the magnitude and seriousness of the problem and by building the necessary coalition to address the issue. Lawyers are but co-equal members of the diverse team of leaders who need to work together to meet the challenge of providing "equal justice under law."

# Recommendations Regarding the Delivery of Legal Services

## Recommendation 1. State Obligation

**Establish the state government's legal obligation either in the state Constitution or by statute to ensure all Californians receive access to justice.**

The majority of Europe's western democracies and Canada's provinces have long recognized their government's legal obligation to ensure poor citizens receive access to justice in civil matters. California law should similarly expressly recognize that government has an obligation to ensure all Californians have meaningful access to quality justice when they need it.

## Recommendation 2. Commission

**Create the California Commission on Access to Justice to provide ongoing leadership and oversee efforts to increase funding and improve delivery methods.**

An ongoing, broad-based California Commission on Access to Justice should be established to implement the findings and recommendations contained in this report. No single entity can solve a problem of the magnitude of providing access to civil justice for all Californians. There must be a coordinated effort among the public, attorneys, and the private sector.

Members might include representatives from groups such as the business and financial communities, consumer advocates, community groups, labor, clients, members of the public concerned with these issues, the judiciary, private lawyers, public lawyers, legal services providers, law school deans/professors, and those with expertise in program evaluation and quantitative analysis.

The details of the actual composition of the Commission, the appointing authority or authorities, and the goals and mission for this new group should be developed as soon as possible following the issuance of this report. The State Bar should take the lead to ensure the establishment of the Commission, whose work is so central to the accomplishment of the many other recommendations in this report.

## Recommendation 3. Civil Representation for the Poor

**Increase funding to guarantee the poor appropriate representation in civil cases, beginning with matters in which basic human needs are at issue.**

As funding streams are redesigned and additional sources identified, monies should be distributed to California's legal services programs to increase both the quantity and quality of services they now provide the state's poor people. As a first step, there should be a funded right to representation in civil matters in which basic human needs, such as housing, food, health care, employment, education, child custody and support, human safety, and public assistance are at issue.

**Recommendation 4. Access For the Near-Poor**

**Improve access to legal services for California's near-poor residents who often find themselves without representation even in the most pressing circumstances.**

As of 1990, while approximately five million Californians lived below 125% of the poverty line, around six million more people lived just above this level, with annual incomes under \$27,500. Because of the high cost of living in California, especially in urban areas where housing costs are well above the national average, many of the near-poor or lower middle class are unable to afford legal services, even when basic human needs are at stake.

As new sources of funding become available, a percentage of this money should be allocated to provide partially subsidized legal assistance to the near-poor and lower middle class. Since the needs of these groups are so great, such allocations should begin even before the legal needs of the poor have been fully met. Work on a comprehensive delivery system is already underway in California as part of the state planning process addressing the reduction of federal funding. These efforts should be encouraged, institutionalized, and continued.

**Recommendation 5. Innovative Delivery Methods**

**Develop innovative methods to deliver quality legal services at affordable prices to more of California's moderate-income residents, ultimately benefitting all Californians.**

According to the ABA's *Comprehensive Legal Needs Study*, many American families with moderate incomes also cannot afford legal assistance for many legal problems. The overarching goal of the California Commission on Access to Justice will be to provide quality access to justice to *all* Californians. Therefore, as new sources of funding become available, a percentage of this money should be devoted to the development, pilot testing, and evaluation of programs designed to increase access to justice for moderate-income Californians.

Innovative delivery methods developed by the California state planning process, which aims to facilitate a more coordinated, integrated system for the provision of legal services for the poor, might be used to increase access to justice for people of moderate means as well. The planning process was convened by a broad cross-section of the legal community, including the presidents of the State Bar and the California Judges Association, and should result in significant ideas about ways to provide effective and efficient legal services. The efforts of this planning group, begun under the auspices of the California Legal Services Planning Steering Committee, should be encouraged, institutionalized, and continued. The California Commission on Access to Justice should also monitor and evaluate programs developed in other states for their potential use in California.

**Recommendation 6. Prepaid Legal Services**

**Explore the feasibility of a statewide prepaid legal insurance plan to help make legal representation available to all Californians.**

One delivery method that should be explored further is a statewide prepaid insurance plan. This plan would offer legal services to any resident who pays the premium and uses either a qualified legal services provider or a participating private attorney who has agreed to the program's reduced-fee schedule. Premiums and/or services for lower middle-income Californians could be partially paid by the government or by a nonprofit agency using public funds, while premiums for middle class participants would be paid by the participants themselves or by their employers.

It is evident that the crazy quilt of existing plans has not realized the potential of prepaid legal insurance to afford the middle classes fuller access to the legal system. Therefore, we recommend that the State Bar seriously consider establishing, or encouraging others to establish, a prepaid program on an experimental basis in one or more California localities. We recognize that the State Bar made an unsuccessful attempt to establish a group and prepaid legal services program twenty years ago when such plans were in their infancy. However, with the accelerating growth in membership in today's prepaid plans, we believe the time has come to reconsider the potential of this delivery method.

This experiment should be designed to study the cost and effectiveness of different types of plans offering comprehensive representation. These should include plans offering the legal equivalent of HMOs, closed panel and preferred provider delivery systems, and various combinations of premiums and co-payments. Based on the lessons learned in this experiment, the State Bar or other appropriate entity should then consider sponsoring a statewide prepaid plan or a series of plans.

#### **Recommendation 7. Alternative Dispute Resolution**

**Continue to develop alternative methods of dispute resolution that increase access without decreasing the quality of justice.**

As presently designed, the American legal system relies heavily on lawyers. Disputants who are not represented by lawyers do not have an equal chance, no matter how just their cause. Alternative methods of dispute resolution that rely less on the adversarial process and the use of lawyers should continue to be developed, tested, and evaluated. Their goal should be to increase access without decreasing the quality of justice for low- and moderate-income litigants.

As the court-affiliated and independent ADR models described in this report are refined and new ones are developed, they should be evaluated not only in terms of whether they provide increased access to dispute resolution mechanisms for low- and moderate-income clients, but whether they can also actually provide access to *justice* for those who appear in these forums without lawyers.

#### **Recommendation 8. Law Simplification**

**Continue to develop promising approaches to simplifying the law and evaluate their impact on access to justice.**

Efforts to delegalize or simplify the law have proliferated in recent years. Pilot programs on promising approaches to delegalization should be developed, tested, and evaluated. The efforts of others to simplify the law should be monitored and evaluated on an ongoing basis for their potential impact (positive or negative) on access to justice. There have been relatively few efforts at legal simplification which have yet succeeded in increasing access to justice, but this does not mean progress in this area is not possible in the future.

#### **Recommendation 9. Supervised Paraprofessionals**

**Expand the use of supervised paraprofessionals in cases where such use results in increased access to justice without decreasing the quality of justice.**

Lawyers are not required to resolve every dispute or solve every legal problem. In certain types of cases, trained, supervised paraprofessionals may be able to handle disputes and thus increase access to justice for the poor. Efforts to expand the appropriate uses of such paraprofessionals should therefore be explored. Studies to ensure that the use of paraprofessionals does not harm the litigants

should be conducted before any implementation of this recommendation occurs, however.

Given the complexity of our laws and court procedures, lawyers are needed in most disputed matters, and on many undisputed issues to represent litigants fairly and effectively. Careful redesign of California's dispute resolution machinery would be necessary before the use of paraprofessionals could become more common and effective in increasing true access to justice.

#### **Recommendation 10. Pro Per Assistance**

**Recognizing they can never provide equal access to justice, as an interim measure, programs that assist litigants in representing themselves in court proceedings should be studied, developed, and improved until adequate legal representation can be provided to all who need it.**

As one manifestation of declining access, larger numbers of low- and moderate-income persons are attempting to represent themselves in court proceedings. While no statewide statistics are available, pro per litigants may constitute over half of court filings; some estimates indicate one or both parties may be in pro per in 65% of cases. Family law, landlord-tenant, bankruptcy, and immigration law have all seen significant growth in levels of pro per filings in the past decade.

The impact of pro per representation on the ability of low- and moderate-income clients to enforce their rights should be thoroughly evaluated, because anecdotal feedback from judges and at least some legal services providers indicates clients who represent themselves frequently lose even when their cases have merit.

The Commission on Access to Justice should attempt to ensure that Californians are not appearing pro per involuntarily and inappropriately in cases where legal assistance is important but unavailable because of the expense. Pro per assistance should not be viewed as a panacea, but as a stop-gap measure to be used in simple, uncontested matters. The goal remains to develop new, more effective delivery methods that enable those unable to afford full representation to achieve meaningful justice. Until that time, the Commission should evaluate and attempt to improve existing self-representation programs. Effective pro per assistance requires adaptations in the format or procedures of the court to accommodate unrepresented parties and to recognize where access to counsel is needed and make referrals to lawyers before unrepresented parties forfeit important interests. Such hybrid systems should be studied and developed to make pro per assistance more productive.

#### **Recommendation 11. User-Friendly Courts**

**Encourage the development and evaluate the results of programs designed to make courts “user-friendly” to low- and moderate-income individuals.**

Court personnel are prohibited from giving legal advice or giving advice about filling out the complicated forms necessary for in pro per representation. Interpreters for litigants who do not speak English and access for those who are disabled are too often inadequate. In addition, courts keep limited hours, making access virtually impossible for litigants who face loss of income or jobs if they do not go to work. In short, California's courts too often are not “customer-oriented” or “user-friendly.”

In its 1993 report, *Justice in the Balance: 2020*, the Commission on the Future of the California Courts issued a series of recommendations intended to make courts more accessible for litigants disadvantaged in some way. The report calls for:

- interpreter services to be made available to all court users who require them, including those without fluency in English and the illiterate;
- courts to institute evening or weekend sessions where public access to justice can be enhanced;
- the language of justice, including forms and procedures, to be comprehensible and clear in both the spoken and the written word;
- justice information to be provided through widely available technologies, including the telephone, the computer, and interactive video; and
- information kiosks to be installed, and staffed by helpful employees, at which court users, especially those unrepresented by counsel, can obtain information and guidance on the dispute resolution system.

The Commission on Access to Justice should work with the courts to assist in reaching these and other related goals. The Commission should consider establishing its own pilot projects to determine what types of court services will best provide access to low- and moderate-income litigants. One possibility might be to consider the implementation for pro bono cases of some special accommodations in court, such as preferential sequencing on motion calendars, or mentor-supervised calendars in specialized courts (e.g., family law, bankruptcy).

An ABA committee on the delivery of legal services to people of moderate income is currently developing a study to analyze ethical rules that result in unnecessary increases in the cost of legal services. The results of such a study could be a valuable additional resource for the Commission on Access to Justice.

The legislature, the courts, and administrative agencies are dealing with problems of physical access to courts. These problems include access for litigants with sight or hearing impairments and for those with other physical disabilities. However, such problems persist and need to continue to be addressed.

#### **Recommendation 12. Small Claims Court**

**Improve Small Claims Courts to make them as effective as possible in providing increased access to justice to low- and moderate-income clients.**

Simplified courts for cases of low monetary value, such as small claims courts, are one of the avenues currently available for low- and moderate-income litigants to seek justice. These courts should be studied to make any necessary improvements or modifications to further increase access to quality justice for the poor and people of moderate means.

Since taking a case to small claims court requires less time and expense than going to a regular court, it is worth experimenting further with this model to make it as effective as possible. In particular, the Commission on Access to Justice should evaluate the effectiveness of existing Small Claims Court Advisor Programs and their potential to assist low- and moderate-income disputants. The Commission could then determine whether a model program can be created for implementation on a statewide basis.

#### **Recommendation 13. Public Education**

**Expand public education programs on understanding legal rights and responsibilities and on finding affordable legal assistance that are targeted to low- and moderate-income people, taking care not to raise expectations that cannot be fulfilled at current funding levels.**

As the ABA's *Comprehensive Legal Needs Study* indicates, many low- and moderate-income families do not know where to turn when they have a legal

problem. Various models for public education about law and the justice system exist, and local legal services programs, local bar associations, and the State Bar of California do a great deal of public education. However, little is known about the effectiveness of these efforts. Public education programs for low- and moderate-income Californians should be designed, tested, and evaluated. These should include programs that make effective use of technology, such as interactive video and computerized legal kiosks. On an ongoing basis, existing public education programs should be monitored and evaluated for their impact on access to justice.

In addition, public education is necessary to improve public awareness of even the structure of the legal system. As part of this educational effort, the concept of equal access to justice can be put in context and explored more completely. The role of legal services programs, pro bono lawyers, and other means of providing access to justice for the poor and near-poor and the importance of this goal to society are also crucial elements in any such public education campaign.

## Options Regarding Funding

Fifteen options for increasing funding for civil legal services in California follow. These are presented as alternatives and are meant to be considered independently from one another. Some may work in concert, while others may work better on their own.

The options are divided into two sections. The first contains the five options the Access to Justice Working Group believes should be addressed on a high-priority basis because of their potential to yield substantial amounts of additional funding for access to justice. The second section contains ten options that should be explored on a lower-priority basis as they could generate smaller amounts of supplementary funding over time.

The entire group of funding options are presented as possible methods of supporting access to justice for both the poor and the near-poor. The Working Group did not intend that the options explain explicitly how any money raised would be targeted; any such allocations could be made, in part, by the California Commission on Access to Justice. (See Recommendation 2 above.) Implicit in these options, though, is the assumption that funding for one group would not be dependent on full funding for the other. Projects aiding the near-poor would receive some money before the needs of the poor are fully met.

### First-Priority Options

#### Option 1. Federal Responsibility

**Pursue ways to reaffirm federal responsibility for maintaining independent legal services programs throughout the country and increase the national Legal Services Corporation appropriation significantly as soon as possible, rather than reduce or eliminate it altogether.**

The Congressional appropriation for the federal Legal Services Corporation (LSC), the single largest source of funding for civil legal services for the poor nationally and in California, should be significantly increased and current Congressional initiatives to restrict, reduce, or even eliminate federal funding should be rejected. At the 1995 federal funding level, \$400 million nationally (after rescission of \$15 million), with funding from a number of other sources, LSC-funded legal services programs employed fewer than one legal services lawyer for every 10,000 poor people in California. In contrast, currently there is one lawyer for every 288 members of the national population<sup>161</sup> and one lawyer for every 256 Californians.<sup>162</sup>

Federal funding for LSC was reduced in 1996 to \$278 million nationally, a 33% reduction nationally and a 38% cut in California. Legal services programs have been forced to lay off a large number of experienced lawyers and other staff members as a result of the cuts. The funding reduction has a disproportionate impact on California partly because national and state support centers have been defunded entirely, and a number of the centers are California-based. In addition,



there is no longer any separate allocation of funds nationally for programs serving migrant farmworkers, and California has the largest migrant population in the country.

There were proposals introduced in 1995 to replace LSC with a so-called “block-grant” program. However, the proposals did not actually combine LSC with other programs and allow states the discretion in allocating funds among the programs, as is true of most block grants. More important, the proposals only provided two to four years of funding; thus the block-grant proposal was merely a stepping stone to total elimination of federal funding. The block-grant proposals did not succeed in 1995, but the concept of phasing out federal funding for legal services may continue to be proposed.

Unfortunately, there is also discussion in Congress about complete elimination of federal funding for legal services for low-income people starting in 1997.

Both the total elimination of federal funding and the “block-grant” approach, which is merely one other way to ultimately eliminate federal support, would result in the loss of local legal services programs as ongoing institutions in their communities. Such a loss would also reduce the opportunities for public-spirited attorneys and other professionals to pursue careers assisting low-income clients. A decrease in the numbers of career legal services lawyers, who work at below market rates of compensation, would impose a significant long-term economic cost on the system of civil justice.

In addition to a funding reduction, the FY 1996 LSC appropriation restricts the activities of legal services programs. For example, class actions are forbidden, notwithstanding that they remain an available legal tool for other client groups. “Welfare reform” work is also forbidden — even if the challenge is to an unconstitutional law or regulation — despite the fact that the purpose of the LSC is to provide representation to people whose income makes them the group affected by changes to, and possibly illegal administration of, public benefit programs. LSC recipients are forbidden to seek court-awarded attorneys fees that they and their clients would otherwise be entitled to receive in cases brought after the bill’s enactment date. Legal services programs receiving federal funds are also prohibited from using any other funding for any purpose prohibited by federal restrictions. This has the effect of importing into California’s Legal Services Trust Fund programs restrictions that California’s legislature has never imposed. Those with adequate financial resources are not burdened with such restrictions.

LSC is a model program and a unique prototype of creative federalism. It is operated in a manner that promotes accountability, local discretion, diversity, flexibility, and cost-effective delivery of high quality services. (Ninety-six per cent of its resources are spent on helping low-income Americans with their legal problems.)

To “establish justice” was one of the original goals of creating a federal government over the separate states. The concept was considered so important it was included in the preamble to our Constitution. Federal funding ensures that legal services programs can exist even in areas of the country where local sources of public revenue would not suffice. LSC combines local control and decision-making with centralization of essential administrative services and fiscal oversight. In fact, LSC is a model of the type of program that should be established and expanded, rather than cut or eliminated.

LSC funding is such a substantial part of total currently available funding that its elimination would cause a large number of legal services programs to close. Every such closure, and, indeed, the ongoing layoffs of experienced full-time legal services lawyers, forfeits part of our investment in building these programs.

The amount of funding available through other federal sources, including the Older Americans Act, the McKinney Act (housing and homelessness), and the Ryan White Act (HIV/AIDS), should also be increased. A concerted effort should be made by the American Bar Association, the National Legal Aid and Defender Association, the State Bar of California, California's congressional delegation, and others to identify and monitor federal legislation to ensure that funding for legal services is included in future appropriations.

### **Option 2. State Responsibility**

#### **Recognizing that lawyers are as essential to justice as courts are, explore having the state government pay for legal representation out of general revenues for those who cannot afford it.**

The most direct and preferred approach for fulfilling the state's responsibility is for the state Legislature to create a line item in the state's budget, perhaps as a part of the judicial appropriation, and provide funding from general state revenues for adequate legal representation for the poor. Essential core functions of government should be, and normally are, financed out of general revenues. Peaceful dispute resolution is one of a small handful of core governmental functions.

In a society where the civil legal system provides justice only to those who can afford a lawyer to access the system, it is not enough for the state to provide courts and alternative means of dispute resolution. The state must also provide funding for legal representation, so that poor people's disputes can be fully investigated, researched, presented, and adjudicated.

The Catch 22 facing poor Californians with legal problems is summed up in a typewritten notice tacked to a bulletin board next to the entrance in some of the state's superior courts:

*The law of California specifically prohibits the practice of law by persons who are not members of the State Bar of California.*

*Clerks of the court are prohibited from giving legal advice concerning the preparation of documents or the adequacy of procedures to be used in pursuing a legal remedy. It is respectfully suggested that you consult an attorney of your choice for any legal advice you may need.*

Without funding adequate to allow all of this state's residents to choose and consult an attorney, the courthouse door will remain effectively closed to many. At least three out of four Californians living below the poverty line, and many living above that line, have no access. The governmental commitment is to provide justice, not just courts — to open the courthouse door for all citizens and make real those words embedded above the doors to the U.S. Supreme Court.

As discussed earlier in this report, the governments of most industrial democracies have recognized this commitment. Thus, they finance legal counsel for those otherwise excluded out of general revenues, just as they finance judges, courthouses and the rest of the justice system. England, for example, spends nearly as much on civil legal services for lower income Britons as it does on that nation's entire court system. (This is in part because England spends less per capita on its court system than California, while investing seven times more per capita on civil legal services than the combined federal and state expenditures in this state.)

California currently spends \$1.7 billion on its court system.<sup>163</sup> If it were to spend even 20% of that amount (\$340 million) on civil legal services for lower-income people, this state could close the gap between the present level of federal funding and the estimated need of the state's almost six million poor people.

### **Option 3. Pro Bono Efforts**

**Develop ways to ensure that California lawyers continue to increase the substantial pro bono efforts they are already making with strong support from the organized bar.**

While California lawyers, acting individually and collectively, cannot provide anything approaching the volume of pro bono legal services necessary to give meaningful access to justice to low-income residents, they should continue to increase the substantial efforts they are already making.

**ABA Aspirational Goal** – The State Bar of California should encourage all lawyers to adhere to the revised American Bar Association Model Rule of Professional Conduct 6.1,<sup>164</sup> which sets forth the aspirational goal that each individual lawyer should perform at least 50 hours of pro bono legal services annually. The rule further suggests that a substantial majority of those hours should be expended for the benefit of persons of limited means or organizations whose primary objective is to address the needs of such people.

The official comment to Model Rule 6.1 recognizes there may be times when a lawyer is unable to fulfill the aspirational goal of providing 50 hours of pro bono services. In such cases, lawyers are urged to discharge their responsibility by providing financial support to legal services organizations in an amount reasonably equivalent in value to the hours of legal service that they otherwise would have provided.

In a similar vein, in 1994 California's Conference of Delegates passed a resolution calling on the State Bar and local bar associations to encourage their members to make a financial contribution to a legal services program or to the Legal Services Trust Fund equal to one billable hour. In July 1995 the State Bar Board of Governors followed suit, passing a similar resolution.<sup>165</sup> While pro bono efforts should continue and expand, private bar financial support for legal services programs is also critical.

**State Bar Voluntary Rule** – The State Bar of California should consider adopting a Rule of Professional Conduct that states an aspirational pro bono goal similar to that contained in ABA Model Rule 6.1. If a lawyer chooses to make a financial contribution in lieu of performing pro bono services, it should represent a sum equal to 50 hours times the individual lawyer's regular hourly fee (or its equivalent for lawyers who work on a different basis.)

Florida recently adopted a requirement that all lawyers must annually report to the Florida State Bar the number of hours of pro bono service they have performed and/or the amount of money they have contributed. Attorneys in Florida also report whether such work was done through an organized pro bono program or through the lawyer's own practice. The State Bar of California should study this requirement and its results with the possible goal of adopting (or adapting) a similar one in this state.

Florida has completed two years of mandatory reporting. Under the state's rule, "pro bono" is defined as providing legal services to the poor either directly or through an organization whose primary purpose is to benefit the poor. In the first year, 1993-1994, 23,000 lawyers reported they had contributed 807,000 hours of pro bono service. Another 4,400 lawyers donated \$1.5 million in lieu of providing services.<sup>166</sup> There are approximately 52,000 members of the Florida Bar.

Only preliminary statistics have been collected for the second year, 1994-1995. The totals for both hours worked and money contributed decreased, but this is probably due to the fact that there was more accurate reporting in the second year as attorneys understood the program better. In the second year, 23,000 lawyers

said they did approximately 575,000 hours of pro bono work, 3,600 reported they donated about \$875,000, 7,800 deferred doing pro bono work, and 11,000 said they were unable to do any such work.<sup>167</sup>

Even if every individual lawyer were to make a reasonable contribution of time and/or money, it is clear that the legal profession could not, acting on its own, fill the unmet need for civil legal services in California. However, it is equally clear that the legal profession can expand its pro bono efforts to increase the number of lawyers participating. If lawyers will not do so voluntarily, then a mandatory program may have to be implemented.

#### **Option 4. Litigation-Related Fees**

##### **Consider ways to increase litigation-related fees to support increased access to justice.**

Another promising possibility is to increase litigation-related fees to support increased access to justice. Those who can afford access to the justice system and choose to use it should pay a nominal amount to help defray the cost of providing access to those who cannot afford it. Several possibilities are worthy of further development.

**Fee Out of Recoveries** – Under this proposal, a percentage of recoveries from trials or settlements would be paid as a fee. The fee could be assessed on successful plaintiffs' recoveries or on losing defendants as an add-on to the damages they must pay the plaintiff.

Once again it is difficult to make revenue projections with available statistical data. However, making the conservative assumption that the dollar value of all California plaintiffs' recoveries totals at least \$5 billion a year shows that a one per cent fee would yield \$50 million a year and a two per cent fee would yield \$100 million a year. (If settlements and verdicts total \$10 billion, the same fees would yield \$100 million and \$200 million, respectively.)

**Fixed Per Case Filing Fee** – This would be an add-on to current fees charged for filing complaints and, possibly, other litigation documents. There were 1,068,473 superior court filings in California in 1993-1994. If the fee charged for such filings were increased \$20 each, this would increase revenues by over \$21 million. If \$2 were added to the fee for the 8,179,544 municipal court non-parking filings in 1993-1994, an additional \$16 million would be raised.<sup>168</sup>

Assuming that the same fee is charged for a relatively minor case as for a multi-million dollar dispute, fee increases of this nature will likely fall disproportionately on the many minor cases. A sliding scale "add-on" fee should therefore be considered along with an across-the-board increase.

A drawback to this fee idea is that reducing recoveries may itself act as a barrier, harming access to justice. This possible negative effect should be kept in mind when structuring any proposal for a fee imposed on litigants.

#### **Option 5. Tax On Value of Legal Work**

##### **Explore the feasibility of imposing a tax on the value of work performed by attorneys, private judges, and other legal professionals that would generate significant revenue to expand access to civil justice.**

If the state government declines to allocate sufficient funding out of general revenues to fill the gap between available resources and need, the state should create new sources of revenue dedicated to closing this gap. Among the most promising possible sources is a "sales tax" or "gross receipts tax" on work that is legal in nature, with a portion of the receipts dedicated to increasing access to

justice. The Netherlands, for example, accomplishes this by dedicating a portion of its value added tax on private lawyers to government programs for legal services for the poor. Hawaii, New Mexico, and South Dakota all tax legal work. Other states have established lawyer licensing fees that bring money into the state treasuries that is greater than the cost of administering bar-related activities.

Sol Linowitz, author of *The Betrayed Profession: Lawyering at the End of the Twentieth Century*, sees a tax on legal work as a way for lawyers who do not wish to do pro bono work for the poor to support equal justice. Such a “special tax on lawyers’ fees” would benefit legal services, and he argues that most of the money gathered should be earmarked to support the salaries of career legal services lawyers. The rest of the funds raised could go to bar association referral services to help defray the fees of private bar attorneys who take on referral cases.<sup>169</sup>

Although revenue projections are estimates, it appears that enacting a tax on legal work alone would generate significant funding for civil legal services. The gross receipts of California law firms exceed \$16 billion a year.<sup>170</sup> Thus, a one per cent tax would generate \$160 million in revenues, and a three per cent tax would generate \$480 million.

The potential for such a large amount of new funding makes it increasingly inevitable that some form of professional services tax may be enacted. In fact, California legislators have recognized the potential revenue that taxing sales of services could generate for the state’s coffers. In 1991 they proposed a three per cent tax on a wide range of services, including legal work. At that time, supporters of the legislation estimated the measure would yield \$3.6 billion in FY 1992–93 alone.<sup>171</sup> The State Bar of California has the opportunity to assume a national leadership role both in representing the interests of the legal profession in structuring the tax provisions and in ensuring that all or most of any tax on legal work is designated for the support of legal services and the pursuit of the goals outlined in this report. California should also take a leadership role in the formation of a national coalition to share information and strategies and build support around this issue.

Certainly, some members of the profession in states where such taxes have been proposed have expressed serious reservations. In Massachusetts, for example, the Boston and Massachusetts Bar Associations brought a lawsuit against the tax, centering on loss of profitability and loss of business. When discussion of a similar tax began in Washington, D.C., some firms spoke of relocating. Large firms expressed concerns they would lose business to in-house counsel. Small law firms and individual practitioners raised concerns about the burdens associated with administering the tax.

Some of these concerns might be addressed by imposing this tax on all legal work *consumed* in California, whether the provider were a California-based law firm or an out-of-state firm or a corporation’s own in-house counsel. Furthermore, it should be feasible to design this tax so it imposes a lesser administrative burden on small law firms than payroll taxes that they already administer.

It can also be argued that lawyers should have to pay a fee in exchange for their monopoly over a vital government function. The fee should be sufficient to defray the cost this monopoly imposes on the general population. The “sales tax” or “gross receipts tax” discussed above is the only fair way to assess such a fee. Increasing bar dues for this purpose would not be fair because it would impose an unfair burden on lawyers who are not profiting much from the monopoly and too small a burden on those who are profiting greatly.

In addition, some of the legal work that paying clients consume contribute to the legal problems low-income people face, e.g., legal work that designs leases

or contracts that poor people often sign to their detriment. It is only fair that this legal work be taxed to ensure that it does not produce injustice among those who cannot afford counsel to respond to the problems this work has created.

## **Second-Priority Options**

These ten options would provide a smaller amount of funding for legal services than the first-priority ones. Unlike the earlier options, none of these would provide the significant amount of additional funding required to provide access to civil justice for all Californians who need it.

### **Option 6. Punitive Damages**

#### **Dedicate a portion of punitive damage awards to increasing access to justice.**

Another possibility for supplemental funding is to require that a portion of punitive damage awards be diverted to an administrative body, such as the Legal Services Trust Fund, and dedicated to the support of legal services to pursue the goals outlined in this report. The primary purpose of punitive damage awards is to discourage malicious or egregious conduct, rather than to provide a windfall for victims who already have been awarded their actual damages. Therefore, a significant portion of punitive damage awards could be directed to fund legal services without compromising the deterrent and disciplinary purpose of such damages.

Legislatures in nine states have passed similar bills capturing a portion of punitive damage awards during the last few years. Those in Colorado and Georgia were held unconstitutional and a third in New York was recently repealed because of a sunset provision. Laws in six other states are still in effect, and the U.S. Supreme Court refused to hear a challenge to the constitutionality of Florida's law in 1994. Only Iowa channels the funds to legal services, though, and the amount generated to date is less than \$1 million.<sup>172</sup>

The existence of money in the Iowa fund depends entirely on whether there are any sizeable punitive damages awards and whether the fact finder in the case determines the defendant's conduct was directed specifically at the plaintiff. If it was not, 75% of the punitive award goes to the Civil Reparations Trust Fund, which is governed by the state's Executive Council. Legal services programs must apply to the Trust Fund for grants. As of early 1996, all money in the fund was earmarked and it will run out in June 1997 unless there is another large punitive damage award with a resulting diversion to the Trust Fund.<sup>173</sup>

In 1993, the State Bar of California's Legal Services Section began development of a bill intended to capture 20% of punitive damage awards and distribute the money to qualified legal services programs. The Section was able to work with legislators to move such a bill forward, but it failed to pass in 1995.

Several issues need to be addressed before such efforts begin again. Punitive damages will not provide legal services programs with a steady source of income. These awards are often not large or frequent and the total of the awards varies substantially from year to year. Implementation issues also pose problems. For example, proponents need to decide whether to deduct the percentage before or after attorneys' fees are paid and how to handle settlements during an appeal. Settlement amounts could be deemed to include compensation based on punitive damages exposure.

It is difficult to estimate the amount of money such a provision might generate in California since predicting the level of aggregate annual punitive damage awards is very difficult. Courts often reduce these awards by more than half, for

example. Assuming punitive damage awards total \$100 million per year in California, however, a 20% assessment would yield \$20 million for legal services in the state.

Despite these uncertainties, the nature of punitive damages awards makes them a more attractive option for a legal services assessment than other types of judgments. Since punitive damages are supposed to act as a deterrent, it is possible to contemplate collecting a higher percentage from them than could reasonably be taken from other awards. If the collection is well designed and the issues noted above are addressed, punitive damages could be a logical and welcome source of supplemental funding for civil legal services.

### **Option 7. Class Action Residuals**

#### **Divert class action residuals to support increased access to civil legal services for the indigent.**

Other possible sources of supplemental funding are legislation allowing class action residuals to be diverted to a fund to support civil legal services and/or imposing a percentage fee on all class action recoveries.

**Class Action Residuals** – In 1992, the California Legislature passed a bill (SB 536) sponsored by the State Bar of California that gives judges the discretion to divert class action residuals “in any manner the court determines is consistent with the objectives and purposes of the underlying cause of action, including to child advocacy programs and to the California Legal Corps.”<sup>174</sup> Residuals are funds which cannot be disbursed because members of the class cannot be located or because the amount of the award per person is smaller than the cost of distribution.

Designed as an umbrella organization, the Legal Corps would support numerous projects intended to provide information, advice, and representation to low-income Californians. As of the publication of this report, no funds have yet been received to implement the California Legal Corps. However, some judges have dedicated class action residuals directly to local legal services programs and some new foundations have been formed with seed funding from class action residuals.

**Percentage of Class Action Recovery Fee** – This fee could be imposed either on a class action recovery before it is paid to the class and the class lawyers or as an “add-on” cost imposed on losing defendants. It might, for example, be a one to five per cent fee on all successful class action recoveries.

Assuming aggregate class action recoveries average a generous \$1 billion a year in California, a one per cent fee would yield \$10 million and a ten per cent fee would yield \$100 million. Total class action recoveries tend to vary rather dramatically and unpredictably from year to year, though, so estimates about them are very rough. No matter what their actual levels, class action fees could represent a source of modest supplemental funding for civil legal services.

### **Option 8. Real Estate Escrow**

#### **Direct interest on real estate escrow accounts to expand access to justice in civil matters.**

Another possibility for raising funds to increase access is to collect interest that accrues on real estate escrow accounts and direct it to the support of legal services. Currently, when a bank is the escrow holder, it keeps any interest earned for itself. Before the Legal Services Trust Fund was established to receive the interest on attorney trust accounts, the same was true of the interest from those accounts.

Such real estate escrow proposals have passed in Ohio and Washington. The Ohio proposal became effective January 1, 1996. Interest derived from escrow accounts in real estate closings is earmarked for the state's IOLTA fund. A very rough estimate indicates this rule will generate between \$2 million and \$3 million per year, doubling the current IOLTA funds for the state.<sup>175</sup>

The procedure for handling real estate escrow accounts in Washington is different from that in Ohio. Washington created their program through a rule change approved by the state's Supreme Court that became effective December 9, 1995. This new court rule brought limited practice officers (LPOs), who handle the legal documents in real estate closings, within the IOLTA program. In closings where LPOs are involved, the LPO must ensure that the money in escrow is held in an interest-bearing trust account. Pooled interest-bearing trust accounts must be maintained for funds that are nominal in amount or expected to be held for a short period of time. The interest resulting from the pooled accounts goes to the Legal Foundation of Washington.

It is hoped this rule will generate significantly more money for legal services in Washington, but it is still too early in the program to make any accurate predictions. In the first month, December 1995, over \$50,000 was raised. This was a 20% increase over normal IOLTA levels and was only part of the total money available. Since the rule had just become effective, December was only a partial month and there was no way to know how many of the 1,200 licensed LPOs were in compliance.<sup>176</sup>

Since California has roughly three times the population of Ohio and substantially higher real estate values, it is reasonable to anticipate such a proposal might yield \$30 to \$40 million a year in California, assuming the Ohio estimates are accurate. Any funds raised through this approach could be targeted for legal services housing work and shared with affordable housing groups.

### **Option 9. Government Contracts**

#### **Increase government contracts with legal services organizations to provide services to low-income clients.**

Some additional revenue to support access to justice could be generated by increasing the number of opportunities legal services programs have to obtain government payments for the provision of legal services to eligible clients.

**Fee for Service Contracts** – Such contracts allow legal services programs to bill a governmental agency or other entity for services they provide to clients. Legal services programs are frequently more cost-effective than public agencies because of certain efficiencies, including staff with the necessary expertise to handle these cases and the programs' ability to integrate pro bono lawyers into their efforts.

Specifically, these contracts might fund litigation to combat consumer fraud, nursing home abuse and neglect, elder abuse, and slum housing conditions. There have been contracts between several California counties and their local legal services offices to help indigent residents qualify for federally-funded SSI benefits, in lieu of remaining on locally-funded general assistance programs.

Another example of the use of such contracts was the flat fee contract between Legal Services of Northern California (LSNC) and the Sacramento Human Rights and Fair Housing Commission (a city/county agency). Under this program, which ran from June 1994 to December 1995, LSNC hired and managed an attorney to supervise housing authority paralegals who had also been trained by LSNC. In addition to the attorney's salary, LSNC received a fee for overseeing the program.<sup>177</sup> The four paralegals answered telephone inquiries about fair housing and landlord-tenant questions, helping over 1,600 people per year. As had



always been the plan, the housing authority took the program in-house when they received enough funding to do so. They would have been unlikely to get such funding without the training and supervision LSNC provided.<sup>178</sup>

The new Congressional restrictions on LSC grants could thwart these efforts if local governments wished to compensate LSC recipients for legal work outside the areas permitted for the use of federal funds. Congressional restrictions would thus run contrary to desires to increase local control and flexibility to address particular local needs.

**Special District Revenues** – Existing and proposed special assessment districts include areas such as transportation, sanitation, waste management, medical facilities, and utilities. As an increasing number of special districts are created, an impact analysis should be performed to determine whether some of the revenue the district generates should be set aside to provide legal services for low-income people, whose rights and interests may be affected by the district.

Cities and counties are creating special districts to help their communities compensate for declining tax revenues. Depending on their scope and structure, these districts have the potential to create specific legal issues that affect the rights of low-income residents, who in turn require legal services. A set-aside could be established to pay these types of costs in the future.

#### **Option 10. Other Litigation-Based Fees**

##### **Explore revenues to be generated from other litigation-based fees.**

Other types of litigation-based fees that may provide modest additional income for civil legal services include the following.

**Court Reporter Fees** – A possible source of litigation-related revenue would be to tax court reporter transcripts, either by the page, job, amount charged to the client, or another measure. (It should be noted that a Transcript Reimbursement Fund already exists, through which the Court Reporters Board of California provides free transcripts to indigent clients up to a maximum of \$300,000 per year.)<sup>179</sup> The new fee could be imposed on either court reporters or on litigants, although further burdening the revenues of court reporters could be deemed inappropriate. Any proposal for an additional fee on court reporting should be studied to determine its likely incidence and effects.

**Default Judgment Fees** – A plaintiff who obtains a default judgment has few pre-trial or trial costs, resulting in a substantial savings in litigation-related expenses to him/her. A special fee could be assessed against these parties who execute on default judgments, with the revenue earmarked to support legal services. It would be fair to give such proceeds to legal services programs as a significant proportion of defaulting parties are legal aid-eligible clients who likely defaulted because they did not have access to legal assistance.

Since default judgments are a relatively minor subset of total judgments and settlements, the revenue projections from this source are much lower than those from the other proposals in this section. It is unlikely this source would generate more than \$5 or \$10 million in revenues per year. Accordingly, this proposal must be considered only as a source of a limited supplemental contribution to legal services funding.

**Litigation-Related Fees** – Another possibility is to provide for litigation-related attorneys' fees in legislation that would be injurious to low-income people. The deleterious effects of such legislation could be mitigated by amendments ensuring access to legal counsel for those who may be adversely impacted.

The courts have established “in pauperis” guidelines by which court fees are waived for low-income people. Similar arrangements would need to be applied to any new litigation-related fees.

It should be noted that federal funding restrictions prohibit LSC recipients from accepting attorneys’ fees, which are available to other counsel. This prohibition on programs serving low-income people could hamper efforts to fund legal services programs through litigation-related fees if programs are not allowed to request or accept the benefits of such fees.

### **Option 11. Pro Bono Outreach**

#### **Broaden pro bono opportunities to involve currently under-represented groups of lawyers in making a significant contribution.**

The State Bar of California and local bar associations should expand their efforts to encourage pro bono activities by lawyers who traditionally have not participated in them. For example, government lawyers at the federal, state, and local levels frequently do not participate in pro bono. Coordinating efforts with the Association of California State Attorneys may be a productive method of encouraging these attorneys to do so. Another possible pool for pro bono volunteers are law school administrators and faculty members, judicial law clerks, and retired judges, who, if properly encouraged and organized, could greatly increase the numbers of hours donated to legal services on an annual basis. In addition, there is a pool of currently underemployed lawyers who could be an excellent resource for pro bono work. These attorneys, who are often beginning their legal careers or are transitioning between jobs, could use pro bono opportunities and the supervision provided to keep their knowledge and practice skills fresh.

Methods to target these and other groups of lawyers include the following:

**ABA Law Firm Challenge** – California’s large law firms should be encouraged to commit to the ABA Law Firm Pro Bono Challenge if they have not done so already. The Challenge sought to get the nation’s largest 500 law firms to agree, by 1995, to contribute free legal services equivalent to either three or five per cent of the firm’s total billable hours. A majority of such donated services were to be directed to persons of limited means.

By February 1996, over 170 of the country’s largest 500 law firms (roughly, those with 70 or more lawyers) had committed to the Challenge. Fifteen of those participating are in California. (This is 25% of the approximately 60 large firms in the state.)<sup>180</sup> Estimates indicate that if every large firm in the nation accepted the Challenge, more than 91,000 lawyers would be providing more than seven million hours of free legal assistance each year. If all 63 of the large California firms participate, they will supply over one million hours of free legal assistance to low-income residents. (This will not represent a net increase of one million hours, however, since a number of these firms already furnish substantial pro bono services.)

**Challenge Funding** – The ABA/Federal Challenge program, now on the drawing board, should be fully implemented with ample support from the State Bar of California. This two-prong program would strongly encourage lawyers and law firms to increase their pro bono services and/or their financial contributions made in lieu of service (“buy outs”). The challenge would also urge the federal government to match the increased support from the legal community dollar-for-dollar. A related proposal calling on the federal government to match the dollar value of existing pro bono contributions by the nation’s lawyers at a one-for-one level should also be considered.

**Corporate Legal Departments** – California should take a leadership role in challenging corporate legal departments to encourage their members to participate in pro bono activities. The American Bar Association is currently formulating a Corporate Law Department Pro Bono Challenge to attempt to stimulate universal participation by “in-house counsel” attorneys in pro bono endeavors.<sup>181</sup> The ABA plan will also try to stimulate greater pro bono commitments by the corporations’ outside law firms by requiring, as a condition of engagement, that the outside firm demonstrate a pro bono commitment. This, in turn, could encourage “joint venture” pro bono efforts in which corporate attorneys join attorneys from outside firms on certain types of projects.

**Lend-an-Associate Programs** – Law firms should be encouraged to “lend” associates on a rotating basis to legal services organizations for a defined period of time. In some cities like Chicago, large law firms lend associates to legal services programs for periods of up to six months, while continuing to pay the associates’ salaries and benefits. From the firm’s standpoint, the associates receive valuable training and experience in the areas of client contact, client counseling, and courtroom performance. The legal services organization benefits not only from the donated legal work, but also from the likelihood that the associates will maintain an ongoing volunteer connection with the program after returning to their private firms.

### **Option 12. Law Students**

#### **Encourage and facilitate the participation of more law students and legal paraprofessionals in public interest work.**

New programs should be created to encourage more students to pursue public interest positions and/or careers. Such programs might include law student participation in pro bono work, loan forgiveness programs, and public interest clerkships.

**Law Student Participation** – The State Bar should encourage law schools to maximize opportunities for law student participation in pro bono work. Doing so would create an infrastructure to support increased voluntary pro bono and might lead to consideration of mandatory pro bono programs at the schools. Many law schools operate clinical programs, but they often involve only modest numbers of students.

As of 1995, ten schools nationwide had instituted mandatory pro bono, requiring such service as a condition of graduation.<sup>182</sup> The mandatory obligation ranges from twenty to 70 hours annually, depending on the school. In addition, many schools devote resources to identifying voluntary pro bono opportunities in their communities or to placing students in public interest jobs.

Whether law schools institute voluntary or mandatory pro bono programs, it must be recognized that students require more intensive mentoring than lawyers. Therefore, resources must be committed to developing an infrastructure that ensures appropriate case placement, supervision, and follow-through. This investment will pay off by establishing an ethic to perform pro bono work based on the sense of professional fulfillment it provides early in students’ careers.

**Loan Forgiveness Program** – A meaningful law student loan forgiveness program, seeded with federal or state funds, should be implemented. When students finish law school they are often saddled with enormous debt – accumulated indebtedness of \$70,000 is not unusual. Owing such large sums creates a tremendous impediment to pursuing public interest legal careers, as such careers pay a fraction of private sector salaries. A handful of schools have created loan forgiveness or loan

repayment deferral programs, which are intended to subsidize partial or full repayment of loans for people who choose poverty law jobs.

In addition, similar loan forgiveness programs for paralegals would help increase the numbers of paraprofessionals entering public interest law. At least one school, the University of California at Irvine, Extension, will support and participate in the creation of a loan forgiveness program for graduates of their ABA-certified paralegal program who take a job with a legal services organization.<sup>183</sup>

Nearly all existing loan forgiveness programs suffer from a lack of funding, too low a cap on what students may earn to qualify for the program, and uncertain tax treatment of the loan once forgiven. As yet, very limited public funds have been committed to any loan forgiveness program in this country. Congress approved the first federally-funded student loan package intended to encourage graduating students, including law students, to enter public service work in 1994.<sup>184</sup> It was revised in 1995 and may be revamped again in the future. The goal of the program is for the government to take over a participant's federal loans and provide a cap on the payments due. The principle of the loan is forgiven after the participant works in public interest law for a lengthy period of time.<sup>185</sup>

**Public Interest Clerkships** – The State Bar of California should continue to work with the National Association for Public Interest Law (NAPIL) initiative encouraging local bar associations to sponsor public interest clerkships and fellowships for law students and recent law school graduates. Local bar associations would be responsible for funding and/or developing the funding for these new positions.

#### **Option 13. Increase Trust Fund Yield**

##### **Continue efforts to increase the net yield on the Legal Services Trust Fund.**

The State Bar of California should continue to support the Legal Services Trust Fund Commission's efforts to increase the net yield on lawyers' trust accounts through higher interest rates, lower bank service charges, and other policy changes.

For example, the State Bar had submitted to the state Supreme Court a proposed rule that would permit lawyers to establish "sweep" accounts that would automatically move money out of checking accounts once they reach a certain level and transfer that money into a money market fund.<sup>186</sup> Funds would sweep back into the checking accounts as needed. It is estimated lawyers hold between \$600 and \$800 million in their trust accounts at any given time. The LSTF Commission projects that, if all lawyers with trust fund accounts converted them to sweep accounts, the new accounts would increase the net interest earned by one percentage point or more annually, boosting the yield by \$2 million to \$6 million. Although the initial petition was denied, the State Bar is developing alternative proposals that, it hopes, could gain Supreme Court approval.

#### **Option 14. Lawyer Referral Services**

##### **Increase the quantity and quality of advice Lawyer Referral Services provide to low- and moderate-income clients.**

Lawyer Referral Services (LRSs) should consider expanding the consultations and advice to the legally indigent that are made available through their panel attorneys from the usual half hour to a minimum of one hour. LRSs should themselves underwrite the second half hour of advice and counsel for indigent clients or, in the alternative, encourage panel members to provide expanded consultations to the poor on a pro bono basis.

According to the ABA's *Comprehensive Legal Needs Study*, 20% of low-income families who sought legal assistance received no more than an initial free consultation with a private attorney.<sup>187</sup> This being the case, these half-hour consultations should be expanded to provide more complete and meaningful assistance to the indigent clients who cannot seek representation elsewhere.

At the same time, LRSs should establish moderate-means panels where lawyers agree to provide reduced-fee services to the near-poor and to Californians of moderate means. The Santa Clara County Bar Association's LRS has successfully operated a moderate-means panel for the past five years. Participating lawyers have agreed to provide legal services at one-half the going market rate for legal fees.<sup>188</sup>

### **Option 15. Philanthropic Giving**

#### **Continue and expand efforts to increase philanthropic giving to fund legal services for low-income people.**

Leaders of the State Bar of California and experienced legal services staff should continue to work with local programs to coordinate efforts to educate the philanthropic community. The goal is to increase this community's contributions to legal services efforts. Such funding, however, generally should not be viewed as long-term. Rather, it should be considered (1) a stop-gap measure until permanent and more significant sources of funding are located and (2) a source of funding for research, experimental programs, and evaluations.

The philanthropic sector is composed of both foundations and of individual donors. Nationwide, charitable foundations and corporate giving funds donate approximately \$14.3 billion annually to the provision of social services by non-profit organizations. Foundations make grants after receiving funding proposals, which are typically reviewed by staff and then voted on by the Board of Trustees. Individuals contribute a significantly higher amount – some \$110 billion annually.<sup>189</sup> Individuals generally contribute through personal solicitation, in support of events, through direct mail, via telemarketing, and through a host of other methods.

Philanthropic giving is a largely untapped resource with respect to legal services and few of the thousands of foundations across the country list legal services as a funding priority. While a handful of foundations understand and are sympathetic to the role of legal services, the great majority are not. Conversely, while all legal services providers recognize the need for adequate funding, not all are yet sophisticated in philanthropic research, cultivation of donors, or grant writing.

**Mutual Education Program** – In order to increase philanthropic giving to legal services, it will be necessary to embark on a mutual education program for donors and recipients. Legal and other community leaders must engage in a cooperative effort to educate the philanthropic sector about the crucial role legal services programs play in the community. (For example, receiving legal services is often a prerequisite to the provision of other social services funded by charitable donations.) As a result of such an educational process, the Legal Aid Society of Alameda County was able to persuade a foundation that assists children to fund a project to measure their exposure to lead in low-income housing. Once the Legal Aid Society identified children suffering from or at risk of lead poisoning, the grant funded their efforts to obtain medical treatment for the children and force landlords to remove the lead paint.

Such an education program can be accomplished through individual meetings and through group settings that include donor program staff and trustees.

This was done, for example, in May and September 1994, when the State Bar president and leaders of the legal services community met with representatives of several foundations in San Francisco and Los Angeles to educate them about the accomplishments and pressing needs of California's legal services programs.

**Increased Fundraising Capabilities** – State Bar leaders and experienced legal services staff should also work more with other local programs to increase these programs' fundraising capabilities and results. For example, the Office of Legal Services held a fundraising training in 1996. Legal services providers need training and technical assistance to help them achieve self-sufficiency in their development efforts.

The Fundraising Project, supported by the Ford Foundation and based in Atlanta, is one national model which assists providers to improve their development and fundraising skills. Another national model, supported by the Ford Foundation and directed by the Consortium on Legal Services and the Public of the American Bar Association, is the Project to Expand Resources for Legal Services (PERLS). The goal of PERLS is to help create alternative funding sources for programs providing legal services to the poor by fostering greater involvement by the organized bar. The Law Foundation, based in Washington, is a state model established by bar and legal services leaders to supplement LSC and IOLTA funding statewide and to enhance the development capabilities of individual programs. California could draw on these models to establish a project appropriate to this state that would expand support efforts for local programs.

**Increased Workplace Giving** – The State Bar of California, in cooperation with local legal services programs, should encourage United Way and other work place campaigns to fund legal services programs. The United Way's overall contribution to the state's legal services programs totalled over \$10 million in 1993.<sup>190</sup> An initiative should be developed to encourage the community United Way organizations that do not now contribute to legal services programs to include them on their giving list.

One example of a successful work place/legal services funding partnership began in San Francisco in 1994 when Pacific Telesis agreed to designate \$50,000 of its United Way corporate donation to the San Francisco Legal Services Collaborative United Way Corporate Campaign for the next three years. Other corporate givers were approached to make similar commitments. All IOLTA-funded programs with San Francisco offices were invited to participate in the fundraising campaign and to share equally in the proceeds.<sup>191</sup>

## In Conclusion

Over the past three years, the Access to Justice Working Group has examined the relationship between poverty and justice for all in California. Our findings are clear: *the civil legal services available to the poor in this state are wholly inadequate to meet the need.*

The legal problems of the poor are many and basic, involving income, food, health, and shelter. These problems occur frequently, are often interrelated, and defy most attempts at self-help because they involve laws and regulations that are many and complex. To deal with these problems, the poor need the assistance of lawyers. They need free, easily-accessible legal assistance.

The near-poor and people of moderate means also need increased access to justice through a combination of subsidized and reduced-fee legal services, based on their ability to pay. They additionally need alternative methods of dispute resolution that are less dependent on lawyers and the complex web of laws and procedures that comprise today's justice system. At the same time, we need to ensure that Californians without counsel are not relegated to alternative forums where lawyers are crucial to achieving justice.

Existing legal services resources have not and will not be able to meet the need. The private bar has done an outstanding job of trying to fill this gap and continues to evince its willingness to do more. However, an all-out effort on the part of the private bar alone cannot do the job. No single entity can solve this problem – a sustained, coordinated effort among leaders in the public and private sectors is required.

Greatly increased funding must be devoted to the provision of legal services for the millions of Californians who are currently denied access to justice, which all too frequently means they are also denied adequate food, safe housing, basic medical care, fair employment, and other necessities of life. The majority of the necessary funding must ultimately come from the Californian people themselves, through the tax dollars which represent our commitment to our democratic system of government and to a better future in which the historic promise of “justice for all” is at last fulfilled.





# **AND JUSTICE FOR ALL**

## **PART THREE**

Appendices,  
Notes and Sources

# Appendix One

## American Bar Association *Comprehensive Legal Needs Study*

This Appendix contains more detailed information drawn from the CLNS, including data on the incidence of legal problems by region, the types of legal needs Americans most frequently experience, their use of lawyers, paid vs. free services, and their awareness of legal services.

**Incidence by Region** – Forty per cent of low-income households nationwide experienced at least one legal need in 1992.<sup>192</sup> However, when broken out on a regional basis, 46% of survey households in the West (predominantly Californians by population) experienced a legal problem, compared with 40% in the Northeast and 38% in the South and Midwest.<sup>193</sup> While the difference between 38% and 46% may seem small, the CLNS actually reveals that in 1992 poor California households experienced considerably more legal problems than did Americans in other regions of the country.

**Types of Needs** – While 40% of low-income households reported experiencing a new legal need in 1992, no more than 13% reported a need in any single category.<sup>194</sup> Among these households, the legal needs most frequently reported were in the broad areas of housing and real property (13%), personal finances and consumer needs (13%), family and domestic needs (8%), employment-related needs (7%), and community and regional needs (7%).

Of the 67 specific legal needs the interviewers asked about, two per cent or more of low-income households experienced 22 of them during 1992. (For additional details about specific legal needs, see Table A.)

**Use of Lawyers** – The CLNS also provides some revealing information about how often poor people seek assistance for a legal need and where they find help. Seventy per cent of all poor households experiencing a legal need did not even attempt to seek assistance from the justice system.<sup>195</sup>

When low-income households faced a situation with legal implications, 24% attempted to deal with the matter on their own. (See Table B.) Another 38% took no action at all. About eight per cent consulted non-legal third parties such as community organizations, regulatory agencies, accountants, realtors or insurance agencies. Only 29% of poor people experiencing legal needs turned to the civil justice system, including lawyers and courts. Of those 29% who encountered the legal system, about three-quarters (73%) saw a lawyer – either in private practice or through a legal services program. The remaining one-quarter came in contact with courts, administrative hearing bodies, arbitrators, mediators, or dispute resolution centers where they represented themselves on a pro per basis.

**Paid vs. Free Services** – *Only one in five* (21%) of low-income families that experienced a legal need in 1992 actually saw a lawyer, either in private practice or at a legal services program.<sup>196</sup> Of those who saw an attorney, the CLNS indicates that nearly one-half (43%) paid or expected to pay either full or reduced fees for the services they received. (See Table C for details about fee arrangements between lawyers and low-income households.)

It is important to note that the majority of those who paid or expected to pay a fee were indigent clients who entered into a contingency-fee arrangement with

their lawyers. The fee they paid came out of any recovery, either in workers' compensation, personal injury, or other tort matters.

Of those poor families with legal needs who sought assistance, approximately 55% did not pay for the legal services they received.<sup>197</sup> About 20% made do with an initial free consultation from a private attorney, 13% received some form of free assistance from a legal services program, three per cent received pro bono legal services from a private attorney, five per cent would have paid a contingency fee but no fee was due because they lost the case, and 13% did not know on what basis they received free services.

**Awareness of Legal Services** – Responses to the CLNS indicate that low-income families are relatively unaware of a variety of legal resources in their communities.<sup>198</sup> For example, while 61% of all survey respondents were aware of the small claims court, only 50% were aware of Lawyer Referral Services or free legal services, and 18% were aware of mediation services. Nearly 17% of poor families were aware of *none* of these resources.

**Table A. Quantifying Types of Legal Needs of the Poor.**

(Poor California households each have approximately one legal need per year.)

| Type of Legal Need                | Incidence <sup>1</sup> | Prevalence | Explanation  |
|-----------------------------------|------------------------|------------|--|
| Problems with creditors           | 6%                     | 8%         | Car/property improperly repossessed; Wages improperly garnished; Serious dispute over charges                                      |
| Suffered personal/economic injury | 5%                     | 5%         | Involved in auto accident; Harmed by defective product; Harmed by service provider's actions                                       |
| Household/marital dissolution     | 5%                     | 6%         | Child custody dispute; Property settlement dispute   |
| Unsafe rental housing             | 5%                     | 7%         | Failure to provide heat/hot water; Serious problem with rats and cockroaches; Unsafe conditions, e.g. unrepaired locks, lead paint |
| Inadequate police protection      | 4%                     | 6%         | Dealers, criminals present; Police do not respond, are not visible; Police are abusive   |
| Problems with landlord            | 3%                     | 4%         | Unreasonable rent increase; Threatened eviction; Dispute over security deposit   |
| Problems with utility             | 3%                     | 4%         | Unreasonable deposit; Dispute over payments; Dispute over shutoffs   |
| Health care costs                 | 3%                     | 3%         | Dispute over charges, payments; Dispute over coverage  |
| Problems related to insurance     | 3%                     | 3%         | Coverage denied; Policy cancelled without cause; Dispute over a claim  |
| Difficulty with public benefits   | 3%                     | 4%         | Benefits unfairly cut or denied; Required to pay back benefits received; Refused a hearing or appeal                               |
| Housing discrimination            | 2%                     | 3%         | Housing denied; Had trouble with financing   |
| Inadequate municipal services     | 2%                     | 5%         | Unsafe public transportation; Unsafe public buildings  |
| Problems with child support       | 2%                     | 4%         | Dispute over paternity; Dispute over collection or payment   |
| Wills/estate distribution         | 2%                     | 2%         | Making a will; Contesting a will; Settling an estate   |
| Discrimination in hiring          | 2%                     | 2%         | Unfair hiring practices; Discrimination due to race, sex, age, disability, or parental status                                      |
| Problems with compensation        | 2%                     | 2%         | Paid less than minimum wage; Paid less than co-workers with same job; Improper tax withholding; Benefits not as promised           |
| Discrimination on the job         | 2%                     | 2%         | Denied promotion/raise; Fired due to race, sex, or age; Given unfavorable work assignments   |
| Working condition problems        | 2%                     | 2%         | Hazardous conditions; Sexual harassment; Serious dispute with union  |
| Barriers to health care           | 2%                     | 3%         | Discrimination based on income or lack of insurance; Long waiting lists; Inadequate facilities                                     |
| Problems obtaining credit         | 2%                     | 2%         | Credit unfairly refused; Discrimination due to race, sex   |
| Bankruptcy-related problems       | 2%                     | 2%         | Help in filing bankruptcy; Serious problems resulting from earlier bankruptcy  |
| Problems related to contract      | 2%                     | 2%         | Signed without understanding; Inability to escape misunderstood contractual obligations; Serious dispute over terms of a contract  |

1. The difference between the incidence and the prevalence rates among the categories reflect differences in the nature of those needs. For example, the incidence rate of "Seriously inadequate municipal services" is 2% while the prevalence rate is 5%, an indication of the chronic nature of the underlying problem. In general, greater differences between the two rates reflect needs which people either find take a long time to resolve or see as chronic and not amenable to resolution.

Source: Data from the American Bar Association's *Comprehensive Legal Needs Study*.

**Table B. Actions Taken by Low-Income Households When Faced with a Legal Need.**

| Action Taken (1,752 households surveyed) |     |
|--|-----|
| Legal/judicial action                    | 29% |
| Non-legal/judicial action                | 8%  |
| Attempted to handle on their own         | 24% |
| No action taken at all                   | 38% |

Source: Data from the American Bar Association's *Comprehensive Legal Needs Study*.

**Table C. Fee Arrangements between Lawyers and Low-Income Households.**

| Fee Arrangements between Lawyers and Low-income Households Seeking Legal Advice |                  |
|---|------------------|
| Were not charged, or did not expect to be charged because:                      | 55%              |
| Free initial consultation   | 20%              |
| Eligible for legal aid  | 13%              |
| Pro bono work   | 3%               |
| Lawyer worked as a favor  | 1%               |
| Contingency fee (lost)  | 5%               |
| Other   | 6%               |
| Do not know reason  | 6%               |
| Charged or expect to be charged:  | 43% <sup>1</sup> |
| Usual fee   | 30%              |
| Reduced fee   | 8%               |
| Do not know if reduced or usual fee   | 6%               |

1. The majority of these cases were contingency fee cases where the lawyer was paid out of the court award or settlement rather than by the indigent client.

Source: Data from the American Bar Association's *Comprehensive Legal Needs Study*.

## Appendix Two

### Alternative Calculations\*

#### **Alternative Calculation of the Near-Poor Population and their Legal Needs Based on a Broader Approximation of the First and Second Quintiles [41.41%]**

As noted in the text of Chapter 4, limited demographic information about California's near-poor population is readily available. The body of the report uses the 38.18% figure to represent the population in the first and second quintiles. As an alternative, it is possible to use the 41.41% figure to calculate both the near-poor population and its legal needs. The 41.41% figure reflects households with annual incomes under \$30,000.

There are around 2.5 million non-poverty near-poor households with incomes under \$30,000.<sup>199</sup> Multiplying this number by 0.9 legal incidents per year gives almost 2.3 million (2,278,632) legal needs for this demographic group.

Calculating the number of unmet legal needs is done by using the same method as was used in the text of the report.<sup>200</sup> If unmet needs are defined as all incidents where nothing was done (regardless of the satisfaction with the outcome) or where the person's own action, nonlegal action, or action by a nonlegal third party yielded unsatisfactory results, the near-poor have almost 940,000 (937,656) unmet needs.<sup>201</sup>

#### **Alternative Calculation of the Near-Poor's Unmet Legal Needs Based on a Broader Definition of Unmet Legal Needs**

*Using the Lower 38.18% Figure (as used in the text)*

If unmet needs are defined as all incidents that are not taken to the legal or judicial system, the near-poor have 1.2 million unmet needs.<sup>202</sup>

*Using the Higher 41.41% Figure (as used in this Appendix)*

If unmet needs are defined as all incidents that are not taken to the legal or judicial system, the near-poor have 1.4 million unmet needs.<sup>203</sup>

#### **Alternative Calculation of the Cost of Providing Subsidies to the Near-Poor Based on a Broader Definition of the First and Second Quintiles [41.41%]**

*Using a narrow definition of unmet legal needs*

With such a definition, the annual cost of meeting those needs would be almost \$190 million.

*Using a broader definition of unmet legal needs*

With such a definition, the annual cost would be over \$280 million.

#### **Alternative Calculation of the Cost of Providing Subsidies to the Near-Poor Based on a Broader Definition of Unmet Legal Needs (and the 38.18% figure)**

The cost estimate in the text reflects a subsidized cost approximation based on 38.18% of the state's population and a narrow definition of unmet legal needs. (This narrow definition encompassed all incidents where nothing was done (regardless of satisfaction with the outcome) or where the person's own action, nonlegal action, or action by a nonlegal third party yielded unsatisfactory results.)

Using a broader definition of unmet need (all incidents that are not taken to the legal or judicial system) led to a calculation of over 1.2 million unmet needs.

\* All cost calculations are in 1993 dollars.

Assuming an average cost of \$202 per case and this figure, the cost to meet the near-poor's unmet legal needs would be over \$240 million.

**Alternative Calculation of the Cost of Sliding Scale Fees Based on a Broader Definition of Unmet Legal Needs (and the 38.18% figure).** (See Table D.)

Providing an average ten per cent subsidy would cost almost \$25 million; an average 50% subsidy would cost over \$120 million.

**Alternative Calculation of the Cost of Sliding Scale Fees Based on a Broader Definition of the First and Second Quintiles [41.41%].** (See Table D.)

*Using a narrow definition of unmet legal needs*

With such a definition, the cost of providing an average ten per cent subsidy would be almost \$20 million. Providing an average 50% subsidy would cost \$95 million.

*Using a broad definition of unmet legal needs*

With such a definition, the cost of providing an average ten per cent subsidy would be almost \$30 million. Providing an average 50% subsidy would cost \$140 million.

**Table D. Summary of Cost Estimates (in 1993 Dollars) to Meet the Unmet Legal Needs of California's Near-Poor Population.<sup>1</sup>**

| <b>Based on an approximation of the near-poor population using 38.18% to represent the first and second quintiles</b> |                     |                     |
|---|---------------------|---------------------|
|   | average 10% subsidy | average 50% subsidy |
| Narrow definition of legal needs  | \$15 million        | \$80 million        |
| Broad definition of legal needs   | \$25 million        | \$120 million       |
| <b>Based on an approximation of the near-poor population using 41.41% to represent the first and second quintiles</b> |                     |                     |
|   | average 10% subsidy | average 50% subsidy |
| Narrow definition of legal needs  | \$20 million        | \$95 million        |
| Broad definition of legal needs   | \$30 million        | \$140 million       |

1. See Chapter 7 and Appendix Two.

# Notes and Sources

## Preface

1. Sixty-nine percent of Californians answered this question wrongly, expressing a belief the government would provide a free lawyer to a poor person sued in a civil case. *California Legal Knowledge Poll*, CAL. LAW., May 1991, at 35. Seventy-nine percent of a national poll sample also expressed the same erroneous belief. Association of Trial Lawyers of America, *1991-1992 Desk Reference Supplement: Commemorating the 200th Anniversary of the Signing of the Bill of Rights* (1991).
2. Number of poor households extrapolated from Census of Population and Housing, 1990: Public Law 84-171 Data; number of legal needs per household extrapolated from AMERICAN BAR ASSOCIATION, FINDINGS OF THE COMPREHENSIVE LEGAL NEEDS STUDY, REPORT ON THE LEGAL NEEDS OF THE LOW-INCOME PUBLIC, 1994, at Table 4-2, at 19 [see below at note 91 for an explanation of this report]; number of needs met annually extrapolated from memo to report author discussing the Annual Case Summary Reports of California Legal Services Offices (Aug. 1994) (on file with the Legal Services Trust Fund Office, State Bar of California). (For detailed discussion of this issue, see Chapter 4: *Quantifying Legal Needs*.)
3. See Public Interest Clearinghouse, *Unequal Justice: A Report on the Declining Availability of Legal Services for California's Poor 1980-1990*, June 1991, at 3 [hereinafter *Unequal Justice*]; see also *Report of Conference on Access to Justice in the 1990s*, sponsored by The American Bar Association Consortium on Legal Services and the Public, and Tulane Law School, May 1989; see also 1980 Census of Housing: Advance Estimate of Social, Economic & Housing Characteristics – Calif. Suppl. Report (U.S. Department of Commerce, Bureau of the Census, January 1983); see also Census of Population and Housing 1990: Public Law 84-171 Data; State Bar of California.
4. See Statute of Henry VII, 1495, 11 Hen. 7, c. 7, 2 Statutes of the Realm 578 (transcribed in 2 Statutes at Large) (replaced 1883, 46 & 47 Vict. c. 49), reprinted in S. POLLUCK, LEGAL AID-THE FIRST 25 YEARS 10 (1975).
5. *A Call to Justice*, 1994, at 7 (a conference paper on file with the Office of Legal Services, State Bar of California).

## Executive Summary

6. *Unequal Justice*, *supra* note 3, at 5; data on file with the Office of Legal Services, State Bar of California.

### 1. Society's Obligation to Guarantee Justice to Those Unable to Afford Counsel

7. Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361 (1922).
8. DAVID BOUCHER AND PAUL KELLY, THE SOCIAL CONTRACT FROM HOBBS TO RAWLS, 1994.
9. See Statute of Henry VII, 1495, 11 Hen 7, c. 7, 2 Statutes of the Realm 578 (transcribed in 2 Statutes at Large) (replaced 1883, 46 & 47 Vict. c. 49), reprinted in S. POLLOCK, LEGAL AID-THE FIRST 25 YEARS 10 (1975).
10. See Justice Earl Johnson, Jr., *The Right to Counsel in Civil Cases: An International Perspective*, 19 LOYOLA 341, 343 n.8 (1985) [hereinafter *The Right to Counsel*]. (“The right to counsel in civil cases was first extended throughout France in 1851 with the enactment of the Law of Jan. 22, 1851, art. 1-20). See also [1851] Bull. des Lois 93, translated in M. CAPPELLETTI, J. GORDLEY & E. JOHNSON, JR., TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES 13 (1975) at 256-69 [hereinafter M. CAPPELLETTI]. In 1901, this legislation was amended to establish a national system of bureaus to determine eligibility and otherwise administer the system. See Law of July 10, 1901, [1901] Bull. des Lois 3 (“*assistance judiciaire*”).
11. See *The Right to Counsel*, *supra* note 10, at 343 n.11. “The right to counsel in civil cases was created in Germany in 1877 with the enactment of sections 1149279 of *Zivilprozessordnung* of Jan. 30, 1877, which actually became operational on October 1, 1879.” ZIVILPROZESSORDNUNG [ZPO] §114(27) (Ger. 1877). The right itself is expressed in the following terms:

A party who is not in a position to pay the costs of litigation without endangering the necessary support for himself and his family is to have his application for legal assistance approved, provided



that the intended legal action – either as plaintiff or defendant – shows a sufficient promise of success and does not appear to be unreasonable.

Klauser & Riegart, *Legal Assistance in the Federal Republic of Germany*, 20 BUFFALO L. REV. 583, 585 (1971) (quoting ZPO §114(27)).

12. *See generally The Right to Counsel, supra* note 10. Norway passed a law providing for a right to counsel in civil cases for indigent Norwegians, *see* Act No. 6, 13 August 1915 §423; Sweden followed with its Law on Free Legal Proceedings, *see* SFS 1919:387 and NJA II 1919, at 617-78, and G & B 2.10.a.; in Denmark the right to counsel in civil cases is part of the program of “free process,” found in the Procedural Code (*Retsplejeloven*) and Special Proclamation No. 562, Dec. 19, 1969.
13. *See generally The Right to Counsel, supra* note 10. An Austrian law enacted in 1781 exempted poor people from payment of court fees. JUSTIZGESETZSAMMLUNG [JGS] 28 (Aus.), and a decree of 1791 provided for appointment of free counsel to represent them in civil cases. JGS 106, HOFDEKRET VOM 24.1.1791. This right became incorporated into the *Zivilprozessordnung* in 1895.

Spain provided for a right to counsel in 1835 with a law establishing the duty to “Administer...complete justice to those who, according to the laws, are in the class of the poor, in the same fashion as to those who pay; taking care as well that in all litigation they should be defended and aided without any charge, as they should, by the lawyers and court officers.” Regulations for the Administration of Justice of September 26, 1835, Arts. 2, 36. This was followed by the first Law of Spanish Civil Procedure, enacted 1855, providing in part for “defense of the poor” and exempting poor people from all legal expenses, taxes, tariffs, and professional fees. Laws of Civil Procedure, Articles 179-200, 1855.

Italy provides through its constitution that “Poor persons shall, by institutions created for that purpose, be assured the means to plead and to defend themselves before any judicial jurisdiction.” M. CAPPELLETTI, *supra* note 10, at 245-46 (translating Royal Decrees of Dec. 30, 1923, No. 3282 (Approving the Law on Legal Aid)).

14. *See generally The Right to Counsel, supra* note 10. Shefer-Heer contre Conseil d’Etat d’Appenzell Rhodes-Exterieur, 8 Oct. 1937, Arrêts du Tribunal Federal, 63, I, 209, *excerpt translated in* O’Brien, *Why Not Appointed Counsel in Civil Cases? The Swiss Approach*, 28 OHIO ST. L.J. 1, 5 (1967).
15. *See generally The Right to Counsel, supra* note 10. The right to counsel in Canada is determined on a province-by-province basis. Beginning with Ontario in 1966, almost all Canadian provinces have developed legal aid programs in civil as well as criminal cases. *See Zemans, Canada, PERSPECTIVES ON LEGAL AID* 93-97 (F. Zemans ed. 1974).

In Australia, legal aid is administered by the state governments. Most of the states created programs modeled on the English scheme of compensated private lawyers. Although there was not an absolute right to counsel in civil cases, as a practical matter any poor person received legal assistance if he or she had “reasonable ground for taking, defending, or being a party to proceeding.” *See Epstein, Australia, PERSPECTIVES ON LEGAL AID* 53 (F. Zemans ed. 1974) (quoting Queensland Act, §19(3)).

In 1969, New Zealand enacted a law based on the English legal aid scheme. Legal Aid Act 1969 (N.Z.) Under this program, low-income litigants are legally entitled to representation by compensated private counsel in civil litigation in the courts.

16. *Airey Case*, 1979 Y.B. EUR. CONV. ON HUMAN RIGHTS 428 (Eur. Court on Human Rights) (summary of result), Eur. Court H.R., *Airey Case*, Judgment of 9 Oct. 1979 Series A No. 32 (full text of opinion).
17. U.S. CONST. amend XIV, §1.
18. *See Payne v. Superior Court*, 553 P.2d 565, 576 (Cal. 1976) (due process and equal protection right to free counsel for indigent prisoners involved in civil litigation); *Salas v. Cortez*, 593 P.2d 226, 234 (Cal. 1979) (due process right for indigent fathers in civil paternity actions), cert. denied, 444 U.S. 900 (1979); *State v. Jamison*, 444 P.2d 15 (Or. 1968) (due process right for indigent parents in cases terminating parental rights); *Danforth v. State Dept. of Health and Welfare*, 303 A.2d 794 (Me. 1973) (due process right for alleged fathers in paternity suits); *Lassiter v. Dept. of Social Services*, 452 U.S. 18 (1981) (5-4 denial of due process right in cases involving termination of indigent mother’s parental rights); *In re Smiley*, 33 N.E.2d 53 (N.Y. 1975) (4-3 New York Court of Appeals denial of constitutional right in divorce proceedings).

19. *Martin v. Superior Court*, 176 Cal. 289, 294-95, 168 Pac. 135, 137 (1917).
20. *California State Legal Knowledge Poll*, CAL. LAW., May, 1994, at 35.
21. See *The Right to Counsel*, *supra* note 10, at 346 note 20; see also *id.* at note 23.
22. Justice Earl Johnson, Jr., *Toward Equal Justice: Where the United States Stands Two Decades Later*, 5 MD.J. CONTEMP. LEGAL ISSUES 212 (1994) [hereinafter *Toward Equal Justice*].
23. *Id.* at 212-214.
24. The funding in England and Wales was approximately \$700 million in 1993. See Jeremy Cooper, *English Legal Services: A Tale of Diminishing Returns*, 5 MD.J. CONTEMP. LEGAL ISSUES 247, 254 (1994) [hereinafter *English Legal Services*].
25. California comparisons assume a statewide population of 30 million and are based on the data contained in *Toward Equal Justice*, *supra* note 22, at 212.
26. *California Leads U.S. in Lawyers' Bills*, SAC. BEE., Jan. 16, 1995, at 1 [hereinafter *California Leads U.S.*].
27. Memorandum on Legal Services Funding Figures from Beth Tafe to Paulette Taylor (on file with the Office of Legal Services, State Bar of California) [hereinafter Memorandum, Aug. 3, 1994, on Legal Services Funding Figures].
28. Census of Population and Housing 1990: Public Law 84-171 Data.
29. See Memorandum, Aug. 3, 1994, on Legal Services Funding Figures, *supra* note 27.
30. See generally *English Legal Services*, *supra* note 24, at 255.
31. 1993-94 fiscal year expenditures on California courts totalled \$1.7 billion, Judicial Council of California, *Annual Report*, 1994, with combined federal and state expenditures on civil legal services totalling \$64.1 million.

## **2. History of Legal Services in the U.S. and California**

32. EARL JOHNSON, JR., JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE AMERICAN LEGAL SERVICES PROGRAM (1978) [hereinafter JUSTICE AND REFORM].
33. REGINALD HEBER SMITH, JUSTICE AND THE POOR 131-149 (1919).
34. See JUSTICE AND REFORM, *supra* note 32, at 12.
35. ALAN HOUSEMAN AND JOAN LIEBERMAN, HISTORY OF LEGAL SERVICES: CRITICAL EVENTS AND LEGAL DEVELOPMENTS 6 (1993) [hereinafter HISTORY OF LEGAL SERVICES].
36. *Id.* at 9-10.
37. *Id.* at 39-70.
38. *Id.* at 94-95.
39. *Id.* at 99-100.
40. *Id.* at xxi.
41. *Id.* at x-xxii. See also, LINDA E. PERLE AND ALAN W. HOUSEMAN, THE LEGAL SERVICES CORPORATION: ITS FUNCTIONS AND HISTORY 8 (Nov. 18, 1993) [hereinafter THE LEGAL SERVICES CORP.].
42. See LSC Act, 42 U.S.C. 2996, §1001; see also THE LEGAL SERVICES CORP., *supra* note 41, at 1.
43. See THE LEGAL SERVICES CORP., *supra* note 41, at 1.
44. Letter from Corporate General Counsel for the Preservation of Legal Services to the U.S. House of Representatives and U.S. Senate, Washington, D.C. 1-2 (Mar. 10, 1995).
45. See HISTORY OF LEGAL SERVICES, *supra* note 35, at 6.
46. *Id.*
47. *Id.*
48. See THE LEGAL SERVICES CORP., *supra* note 41, at 9.
49. *Id.*
50. *Id.*
51. *Id.*

52. The LSC appropriations increased from \$308.5 million in fiscal year 1989 to \$357 million in 1993, primarily because of Congressional support for the program. (Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act of 1993, Pub. L., No. 102-395, 106 Stat. 1828, 861-61 (1992), as found in Robert J. Rhudy, *Comparing Legal Services to the Poor in the United States with Other Western Countries: Some Preliminary Lessons*, 5 MD. J. CONTEMP. LEGAL ISSUES 223, 236 (1994) [hereinafter *Comparing Legal Services*].  
Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act of 1989, Pub. L., No. 100-459, 102 Stat. 2186, 2218 (1988), as found in *Comparing Legal Services, supra*, at 235.
53. In 1993 the Project Advisory Group (PAG), a leading national organization of legal services programs, estimated that Congress would have to appropriate \$823.2 million for LSC for fiscal year 1994 to permit reestablishing the minimum access field program staffing levels of 1981 while also funding specialized programs at levels essentially comparable to 1981. This amount compared with a 1981 minimum access appropriation for LSC of \$321.3 million, accounting for inflation and increases in the poverty population. Project Advisory Group, Testimony on Funding for the Legal Services Corporation for FY 1994 before the Subcommittee on Commerce, Justice and State, the Judiciary and Related Agencies of the House Committee on Appropriations (May 12, 1993). LSC's fiscal year 1994 appropriation was \$400 million, increased to \$415 million for fiscal year 1995. See PAG Update (Project Advisory Group, Washington, D.C.), Aug. 17, 1994, at 1, as found in *Comparing Legal Services, supra* note 52, at 236.
54. See THE LEGAL SERVICES CORP., *supra* note 41, at 14.
55. These IOLTA programs are the second largest funding source in the United States, after LSC, for civil legal services to the poor, making grants of up to \$100 million annually to LSC grantees and other programs. See *Comparing Legal Services, supra* note 52, at 236; Doreen Dobson, *Interest on Lawyers' Trust Accounts – A Resource for Delivering Legal Services to the Poor*, ABA EXCHANGE: IOLTA IN THE 1990S, Oct. 1993, as found in *Comparing Legal Services, supra* note 52, at 236.
56. See ABA Commission on Lawyers' Trust Accounts, IOLTA HANDBOOK (January 1995, updated December 1995), at Tab 9, at 1.
57. The nation's poor have greatly benefited from these joint efforts. There are now approximately 900 pro bono programs in the United States. Over 135,000 lawyers participate in the voluntary legal aid movement. See *Comparing Legal Services, supra* note 52, at 241.
58. The gross receipts of all private law firms in the United States reached slightly over \$108 billion in 1992. Bureau of the Census, STATISTICAL ABSTRACT OF THE UNITED STATES, Table 1315 (1995) [hereinafter STATISTICAL ABSTRACT].
59. "First, what our government spends to provide poor people with legal counsel in civil cases represents just six-tenths of one percent of this nation's total public-private expenditures on lawyers in civil cases...[W]e find that nearly two hundred dollars are spent on private legal fees for every dollar the government spends on civil legal services for the poor." *Toward Equal Justice, supra* note 22, at 216.
60. Incidentally, this statistic does not even include the elderly poor who are served through Medicare or several other multi-billion dollar health care programs which serve many poor people. If we add in these further public expenditures on health care for the poor, the government total certainly would rise several percentage points of the combined private-public expenditures on health care. Total private-public expenditures on health care for all Americans amounted to \$752 billion in 1991. STATISTICAL ABSTRACT, *supra* note 58, at Table No. 149. The Medicaid program providing health care to the poor had a budget of \$77 billion, representing 10.2% of the total expenditures on health care. *Id.* at Table No. 162, as found *Toward Equal Justice, supra* note 22, at 216.
61. See EMERY A. BROWNELL, LEGAL AID IN THE UNITED STATES 260 (1951).
62. President's Message, CAL. ST. B. J., June 1936, at 136.
63. See HISTORY OF LEGAL SERVICES, *supra* note 35, at 3.
64. See Legal Services Corporation Briefing Book, July 14, 1975: Memorandum of the Legal Services Corporation, 1975 Funding Allocation by State, at 56 (on file with the archives of the Legal Service Corporation, Washington, D.C.).
65. Data on file with the Legal Services Corporation, Washington, D.C.

66. See *Unequal Justice*, *supra* note 3, at 5.
67. See THE LEGAL SERVICES CORP., *supra* note 41, at 10.
68. See *Unequal Justice*, *supra* note 3, at 1; see also Legal Services Budget Request for Fiscal Year 1982, at 1. Data on file with the Office of Legal Services, State Bar of California.
69. *A Call to Justice*, *supra* note 5, at 7.
70. Data provided by Lorna Choy, Legal Services Trust Fund Program, State Bar of California, February 8, 1996.
71. *Id.*

### **3. Growth of Poverty in California**

72. California Department of Finance, *Projected Total Population of California Counties: 1990 to 2040, Report 93-p-3* (Sacramento, CA, May 1993).
73. 1980 Census of Population, Vol. 1, Chapter C (General Social and Economic Characteristics), Part 6 (California), Table 56, at 11; see also Table 72, at 115.
74. Census of Population and Housing, 1990: Public Law 84-171 Data.
75. Legal Services Trust Fund Program, State Bar of California.
76. Ronet Bachman, *Violence Against Women: A National Crime of Victimization Survey Report*, U.S. Dept. of Justice, Bureau of Justice Statistics, NJC-14523, 7 (1994); see also Jane Zora, *Women Battering: A Major Cause of Homelessness*, CLEARINGHOUSE REV. 421 (Special Issue, 1991).
77. Raymond McLeod, *More Children Living in Poverty in California*, S. F. CHRON., June 11, 1993, at A19.
78. Telephone Interview with Tony DiNapoli, Public Information Officer, California State Employment Development Department (Nov. 3, 1994).
79. Telephone Interview with the California State Department of Rehabilitation, Statistics Unit (March 1989) (on file with the Department of Economic Opportunity Advisory Commission, Sacramento) cited in TONY TAYLOR *ET AL.*, CALIFORNIA'S UNFINISHED BATTLE: THE WAR ON POVERTY AFTER 25 YEARS 36 [hereinafter CALIFORNIA'S UNFINISHED BATTLE].
80. U.S. Bureau of the Census, Current Population Reports, Series p-23, No. 128, *America in Transition: An Aging Society*, at 1, U.S. Government Printing Office (Washington, D.C., Sept. 1, 1983).
81. SUSAN GABBARD, EDWARD KISSAM, PHILIP L. MARTIN, THE IMPACT OF MIGRATORY TRAVEL PATTERNS ON THE UNDERCOUNTING OF HISPANIC FARMWORKERS 207-245 (1993) (paper delivered to the 1993 Conference on Undercounted Ethnic Populations, later published by Bureau of the Census, Washington, D.C.); California Legal Services Planning Steering Committee, Draft of Legal Services Plan for the Legal Services Corporation, at section entitled "Poverty in California" (on file with the Office of Legal Services, State Bar of California).
82. California Findings, National Agricultural Workers Survey, Research Report #3, at 48-49 (1993), Office of Assistant Secretary for Policy of the Office for Program Economics.
83. HOMELESSNESS IN CALIFORNIA, 1994 (a paper prepared by the California Homeless and Housing Coalition) (on file with California Homeless and Housing Coalition, Sacramento).
84. California Department of Finance, *Projected Total Population of California Counties: 1990 to 2040*.
85. Report to the Legal Services Corporation Board on Legal Services in California (Mar. 11, 1994) at section entitled "California Indian Legal Services" (on file with the Public Interest Clearinghouse).
86. See CALIFORNIA'S UNFINISHED BATTLE, *supra* note 79, at 25.

### **4. Quantifying Legal Needs**

87. See, e.g., *Unequal Justice*, *supra* note 3, at 3 (the Legal Needs Studies: Report of Conference on Access to Justice in the 1990s, sponsored by the American Bar Association Consortium on Legal Services and the Public, and Tulane Law School (May, 1989); Advisory Council of the Maryland Legal Services Corporation, *Action Plan for Legal Services to Maryland's Poor* (Baltimore, Maryland Legal Services Corporation, 1988); Albert H. Cantril and Susan Davis Cantril, *The Hopes, Fears, and Concerns of Those Eligible for Legal Assistance in Southern Virginia* (Washington, D.C.: Public

- Research, Inc., 1979, for the Virginia Legal Aid Society); Legal Services of North Carolina, Inc., *Client Needs Survey* (1979); Leonard H. Goodman, *A Report on the Jackson (Florida) Needs Survey* (Washington D.C.: National Social Science and Law Project, 1977); Leonard H. Goodman, et al., *Interim Report on a Study of the Legal Needs for the Poor in New Jersey* (Washington, D.C.: National Social Science and Law Project, 1977); Maryland Legal Services Corporation, *Assessment of the Legal Needs of the Poor in the State of Maryland* (1983); Minnesota Legal Services Corporation, *Legal Needs of the Poor in Minnesota: An Assessment of the Unmet Need* (1984); National Social Science and Law Project, *Legal Needs of the Poor in Providence (Rhode Island): Selected Findings* (1980); Nevada Indian-Rural Legal Services, *Analysis of Legal Services Needs* (1981); North Central Texas Legal Services Foundation, Inc., *Report on Program Priorities* (1984); Legal Services of Northern Virginia, *1981 Needs Assessment: Survey Results* (1981); Jessica Pearsons and Nancy Thoennes, "Assessing the Legal Needs of the Poor in Colorado," CLEARINGHOUSE REVIEW (1986), an abstract of *Report of the Legal Needs of the Poor in Colorado* (Denver: Center for Policy Research, 1985); Robert L. Spangenberg, et al., *Massachusetts Legal Services Plan for Action* (Massachusetts Legal Assistance Corporation, Boston, Massachusetts, 1987); Robert L. Spangenberg, et al., *Illinois Legal Needs Study* (Chicago: Illinois State Bar Association and Chicago Bar Association, 1989); Robert L. Spangenberg, et al., *New York Legal Needs Study* (New York: New York State Bar Association, 1989); and Texas Lawyers Care, *Access to the Justice System: A Status Report on the Availability of Representation for Low-Income Texans with Civil Legal Problems* (1983).
88. See *Massachusetts Legal Services Plan for Action*, *supra* note 87.
  89. Leonard H. Goodman, et al., *Interim Report on a Study of the Legal Needs of the Poor in New Jersey* (1979) (on file with the National Science and Law Project, Washington, D.C.)
  90. Jessica Pearsons and Nancy Thoennes, *Assessing the Legal Needs of the Poor in Colorado*, CLEARINGHOUSE REVIEW (June 1986); see also *Report of the Legal Needs of the Poor in Colorado* (1985) (on file with the Center for Policy Research, Denver).
  91. See AMERICAN BAR ASSOCIATION, FINDINGS OF THE COMPREHENSIVE LEGAL NEEDS STUDY [hereinafter CLNS FINDINGS], 1994. CLNS FINDINGS consists of three distinct reports: REPORT ON THE LEGAL NEEDS OF THE LOW- AND MODERATE-INCOME PUBLIC [hereinafter CLNS: LOW- AND MODERATE-INCOME]; REPORT ON THE LEGAL NEEDS OF THE LOW-INCOME PUBLIC [hereinafter CLNS: LOW-INCOME]; and REPORT ON THE LEGAL NEEDS OF THE MODERATE-INCOME PUBLIC [hereinafter CLNS: MODERATE-INCOME]. Additionally, the ABA published AGENDA FOR ACCESS: THE AMERICAN PEOPLE AND CIVIL JUSTICE - FINAL REPORT ON THE IMPLICATIONS OF THE COMPREHENSIVE LEGAL NEEDS STUDY (1996) [hereinafter AGENDA FOR ACCESS].
  92. See CLNS: LOW- AND MODERATE-INCOME, *supra* note 91, at Table 3-2, at 8-9.
  93. *Id.* at Tables 3-1 and 3-2, at 8-9.
  94. This figure was obtained by using U.S. Census figures for the number of households in California in 1990 (10,399,700) and the number of persons living in California (29,003,219). Dividing the latter by the former gives the approximate number of persons per household (2.78885). Here the Working Group assumed the number of persons per household is constant across income levels.  
  
The Census found 4,953,374 persons living below 125% of the poverty level. To find the approximate number of households at this income level, the Working Group divided this number by 2.78885, the number of persons per household in poverty. The result is 1,776,135 households below 125% of the poverty level. Here we assumed that poverty households are the same size as other households.  
  
These calculations were based on Tables 28 and 29, U.S. Census Bureau 1990 CP-2-6, Section 1: Social and Economic Characteristics, California.
  95. See CLNS: LOW-INCOME, *supra* note 91, at Table 4-2, at 19.
  96. U.S. Census, STATISTICAL ABSTRACT (1993), at Table 749, at 482.
  97. Demographic information in this section is derived from the 1990 U.S. Census.
  98. The income distribution of California households (as of 1990) that is available is as follows:
    - 18.93% households at < \$15,000 = 1,969,258
    - 22.87% households at < \$17,500 = 2,378,923
    - 38.18% households at < \$27,500 = 3,971,621
    - 41.41% households at < \$30,000 = 4,307,948

59.08% households at < \$42,500 = 6,144,859

61.61% households at < \$45,000 = 6,410,696

Since the available statistics do not exactly encompass the 40% of households constituting the lower two quintiles, the Working Group used the figure of 38.18%.

For an alternate calculation using 41.41% of California's population, see Appendix Two.

99. The number of non-poverty households (2,195,486) is derived by subtracting the number of poverty households (1,776,135) from the number of households that represent 38.18% of the state's population (3,971,621).

100. See CLNS: LOW- AND MODERATE-INCOME, *supra* note 91, at Table 3-2, at 9, for the figure of 0.9 legal incidents for moderate income households. Using this number assumes it is valid for all income levels within the moderate income category. Table 3-5 reports that only the \$35,000-\$44,999 category has a significantly higher number of incidents than the other income categories. See CLNS: LOW- AND MODERATE-INCOME, *supra* note 91, at 14.

As mentioned in this report, there have been numerous studies conducted on the legal needs of the poor. This wealth of data justified the Access to Justice Working Group's use of the conservative average of 1.0 legal need per household for this population group. The only study done for the near-poor, however, is CLNS FINDINGS. Consequently, the Working Group used the more precise CLNS estimate of 0.9 legal needs per household in this Report for the near-poor population.

101. The analysis of unmet legal needs relies on CLNS: LOW- AND MODERATE-INCOME, *supra* note 91, at Tables 4-1 and 4-2, at 21-22; and AGENDA FOR ACCESS, *supra* note 91, at Table 3, at 6, and Table 6, at 8.

| Most Formal Action Taken | Incidents        | Satisfied        | Dissatisfied     |
|--------------------------|------------------|------------------|------------------|
| Legal/Judicial           | 39%<br>(770,615) | 64%<br>(493,194) | 28%<br>(215,772) |
| Nonlegal/3rd Party       | 12%<br>(237,112) | 57%<br>(135,154) | 40%<br>(94,845)  |
| On Own                   | 23%<br>(454,466) | 50%<br>(227,233) | 45%<br>(204,509) |
| Nothing                  | 26%<br>(513,744) | 39%<br>(200,360) | 46%<br>(236,322) |

102. For an alternate calculation using a broader definition of unmet legal needs, see Appendix Two.

103. 813,098 is the total of 513,744 (no action taken, regardless of satisfaction with the outcome) + 204,509 (person's own action yielded unsatisfactory results) + 94,845 (nonlegal action or action by a nonlegal third party yielded unsatisfactory results).

104. See CLNS: MODERATE-INCOME, *supra* note 91, at Table 4-2, at 19. The 1.0 legal needs figure in Table 4-2 reflects the higher level of legal needs among households with annual incomes in the \$35,000 to \$44,999 range. As mentioned above in note 100, CLNS: LOW- AND MODERATE-INCOME Table 3-5 reports that this group has a significantly higher number of legal incidents than the other income categories.

105. See CLNS: MODERATE-INCOME, *supra* note 91, at Table 5-2, at 41.

### 5. Amount of Access to Justice California Now Provides to the Poor

106. This figure and those following were derived directly by the author's research staff by examining the 1993 Annual Case Summary Reports of the Legal Services Trust Fund Program of the State Bar of California [hereinafter LSTF Case Summary Reports]. (Results of this research are on file with the Legal Services Trust Fund Program, State Bar of California).

107. *Id.*

108. *Id.*

109. Memorandum on Legal Services Funding Figures from Beth Tafe to Paulette Taylor (July 13, 1994) (on file with the Office of Legal Services, State Bar of California) [Hereinafter Memorandum, July 13, 1994, on Legal Services Funding Figures]; Telephone Interview with Beth Tafe, State Bar of California (July 13, 1994).

110. See *Unequal Justice*, *supra* note 3, at 5.
  111. Figures from the State Bar of California, Membership Records.
  112. See *Unequal Justice*, *supra* note 3, at 5.
  113. *A Crisis for the Needy: Legal Programs in Poorhouse*, CAL. ST. B.J., Feb. 1994, at 22.
  114. Data provided by San Francisco Neighborhood Legal Assistance Foundation, January 24, 1996 (on file with the Office of Legal Services, State Bar of California).
  115. Telephone Interview with Jodie Berger, Program Director, Legal Aid Society of Alameda County (Nov. 11, 1994).
  116. Data provided by Legal Aid Society of Alameda County, Mar. 11, 1996 (on file with the Office of Legal Services, State Bar of California).
  117. Data provided by Legal Aid Society of San Diego, Mar. 12, 1996 (on file with the Office of Legal Services, State Bar of California).
  118. Data provided by Legal Aid Foundation of Los Angeles, Mar. 11, 1996 (on file with the Office of Legal Services, State Bar of California).
  119. Data provided by National Center for Youth Law, Mar. 8, 1996 (on file with the Office of Legal Services, State Bar of California).
  120. Data provided by Western Center on Law and Poverty, Mar. 8, 1996 (on file with the Office of Legal Services, State Bar of California).
  121. See *supra*, note 119.
  122. Telephone Interviews with Janis Paular, Transcript Reimbursement Fund Coordinator, Court Reporters Board of California, State of California Department of Consumer Affairs (Nov. 11, 1994 and Feb. 8, 1996).
  123. Salary Report, January 1996, produced by San Francisco Neighborhood Legal Assistance Foundation (on file with the Office of Legal Services, State Bar of California).
  124. Telephone Interview with Robin Levine, Head Trial Attorney, San Francisco Public Defenders Office (Feb. 8, 1996).
  125. Michael Gebhardt, *MoFo is Latest to Raise Associates' Pay Scale*, THE RECORDER, Jan. 31, 1996, at 3.
- 6. Innovative Delivery Methods for All Californians**
126. Telephone Interview with Professor Michael Millemann, University of Maryland School of Law (Nov. 11, 1994).
  127. Involving the California Young Lawyers' Association and local barrister groups might be effective ways to reach such attorneys.
  128. See National Resource Center for Consumers of Legal Services, *Legal Plan Letter*, #304-305 (Sept. 1994) [hereinafter *Legal Plan Letter*].
  129. *Id.*
  130. Telephone Interview with Ginny Holt, Customer Service Representative, Midwest Legal Services (Jan. 20, 1995).
  131. See *Legal Plan Letter*, *supra* note 128, at 493.
  132. Telephone Interview with Marcelle E. DuPraw, Director of the Collaborative Communities Program, National Institute for Dispute Resolution (June 6, 1996). Telephone Interview with Bill Ferguson, Associate Director, National Association for Community Mediation (June 7, 1996). Interview with Ellen Miller, Program Developer/Organizer, Office of Legal Services, State Bar of California (June 13, 1996).
  133. *Arizona Pro Per Information System Project "Quick Court,"* Arizona Supreme Court (on file with the Arizona Supreme Court, Administrative Office of the Courts, Phoenix).
  134. CAL. CIV. PROC. CODE §116.20, §116.940 (Deering 1991).
  135. Telephone Interview with Glendee Scully, Director of Clinical Programs, Community Legal Services, McGeorge School of Law (Nov. 11, 1994). Telephone Interview with Bonnie MacFarlane, Staff Attorney, Small Claims Advisors Clinic (Feb. 8, 1996).

136. Telephone Interview with Jeanne Stott, Small Claims Court Advisor, San Francisco (Nov. 11, 1994 and Feb. 13, 1996).
137. Mark Thompson, *Shortage in the Court: The Pro Per Crisis*, SAN FRANCISCO DAILY JOURNAL, Jan. 30, 1995, at A1 [hereinafter *Shortage in the Court*].
138. Suzanne Northington, *Pro Per Behavior*, CAL. LAW., May 1994, at 29.
139. See *Shortage in the Court*, *supra* note 137, at A1.
140. See *Preventing Homelessness Through Representation of Tenants Faced with Eviction*, 44 THE RECORD 234 (April 1989). [This study in New York City documented that it was very cost-effective to employ lawyers to represent tenants since they prevented such a high percentage of costly evictions which unrepresented tenants would have lost.]
141. See AGENDA FOR ACCESS, *supra* note 91, at 10-11.
142. Telephone Interview with Barbara Shea, Esq. (Feb. 8, 1996).
143. See e.g., Junda Woo, *Entrepreneurial Lawyers Coach Clients to Represent Themselves*, WALL ST. J., Oct. 15, 1993, at B1.
144. See comments to CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 3-400.
145. See CLNS: MODERATE-INCOME, *supra* note 91, at Table 5-21, at 64.

## **7. Estimating the Gap between Current and Necessary Funding for the Poor and Near-Poor**

146. Number of poor households extrapolated from Census of Population and Housing, 1990: Public Law 84-171 Data; number of legal needs per household extrapolated from CLNS: LOW-INCOME, *supra* note 91, Table 4-2 at 19; number of needs met annually extrapolated from memo to author discussing the Annual Case Summary Reports, Aug. 1994 (on file with the Legal Services Trust Fund Program, State Bar of California). (For detailed discussion, see Chapter 4: *Quantifying Legal Needs*.)
147. See Memorandum, July 13, 1994, on Legal Services Funding Figures, *supra* note 109.
148. See *Toward Equal Justice*, *supra* note 22, at 212.
149. Project Advisory Group, Inc., *Equal Justice for People in Poverty: The Long-Term Goal of Legal Services* 14 (1993) (paper presented to the Board of Directors of the Legal Services Corporation, on file with the Legal Services Corporation).
150. 1990 U.S. Census, U.S. Bureau of the Census, Population & Housing Reports, Washington, D.C.
151. U.S. Department of Commerce, STATISTICAL ABSTRACT OF THE UNITED STATES (1994), Table 164, at 117; see also Telephone Interview with Gene Hiehle, Medical Statistics Unit, State of California, Department of Health Services (Apr. 24, 1995).
152. *Id.*
153. Telephone Interview with Karen Ringuette, Public Information Office, Administrative Office of the Courts (Nov. 3, 1994).
154. Chapter 4 used the approximation of 38.18% to reflect the first and second quintiles of the state's population. For an alternative set of cost calculations using the higher figure of 41.41% of the state's population, see Appendix Two. (Recall that both percentages then subtracted the number of people living below 125% of the poverty level.)
155. For an alternate calculation using the broader definition of unmet legal needs, see Appendix Two.
156. For alternative calculations of the cost of subsidizing legal services for the near-poor using (1) the broader definition of unmet need and (2) the broader definition of the near-poor population, see Appendix Two and Appendix Two, Table D.
157. Yankelovich Skelly and White, *The Public Image of Courts: Highlights of a National Survey of the General Public, Judges, Lawyers and the Community Leaders* (1978) (on file with the National Center for State Courts, Williamsburg, Virginia).
158. See Adam Clymer, *Rise in U.S. Optimism on Economy Bolsters Reagan Support, Poll Hints*, NEW YORK TIMES, April 30, 1981, at B10.



159. Yankelovich Skelly and White/Clancy Shulman, Inc., *Surveying the Future: Californians' Attitudes on the Court System* 19 (Dec. 10, 1992) (on file with the Administrative Office of the Courts, San Francisco).
160. Commission on the Future of the Legal Profession and the State Bar, *Summary and Highlights of Key Recommendations* 17 (Dec. 1994) (on file with the State Bar of California).

### Funding Options

161. Telephone Interview with Nancy Slonim, Director of Public Relations, American Bar Association (Nov. 2, 1994).
162. Telephone Interview with Membership Records, State Bar of California (Nov. 2, 1994).
163. Telephone Interview with Karen Ringuette, Public Information Office, Administrative Office of the Courts (Nov. 3, 1994).
164. MODEL RULES OF PROFESSIONAL RESPONSIBILITY Rule 6.1.
165. Res. 1-13-94, 1994 Conference of Delegates, Jan. 13, 1994, at 1-13a-94; Resolution #152, adopted by the State Bar Board of Governors July 8, 1995 (both on file with State Bar of California).
166. Telephone Interview with Michael Tartaglia, Pro Bono Director, The Florida Bar (Mar. 31, 1995).
167. Telephone Interview with Michael Tartaglia (Feb. 13, 1996).
168. Judicial Council of California, *Annual Data Reference*, 1993-94 Caseload Data 10, 55.
169. Linowitz continues, "What is important for the self-respect of the bar is that every lawyer make some contribution, of time or money, to the costs of approaching the goal of equal justice for all. Trade associations can't call for new taxes on their members, but professional associations can." SOL M. LINOWITZ WITH MARTIN MAYER, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* 161-162 (1994).
170. *See California Leads U.S.*, *supra* note 26, at 1.
171. Richard C. Reuben, *Legal Services Levy Begins Hot Debate*, LOS ANGELES DAILY JOURNAL, April 15, 1991, at 7.
172. Memorandum from Mary Viviano, Director, Office of Legal Services, State Bar of California to Legal Services Funding Committee (Jan. 4, 1994) (on file with the Office of Legal Services, State Bar of California).
173. Telephone Interview with Scott Hartsook, Managing Attorney, Legal Services Corporation of Iowa (Feb. 8, 1996).
174. SB 2105, SB 536, 1993-94 Reg. Sess.
175. *See* Memorandum from Denis J. Murphy, *Ohio Civil Legal Needs Assessment Implementation Committee* (May 31, 1993) (on file with Office of Legal Services, State Bar of California); Telephone Interview with Denis J. Murphy, Chair, Ohio Legal Needs Assessment Implementation Committee (Aug. 3, 1994); Telephone Interview with Robert Clyde, Executive Director, Ohio Legal Assistance Foundation (Feb. 8, 1996).
176. Telephone Interview with Barbara Clarke, Executive Director, Legal Foundation of Washington (Aug. 3, 1994); Telephone Interview with Barbara Warren, LPD Program Manager, Legal Foundation of Washington (Feb. 20, 1996).
177. Telephone Interview with Roberta Ranstrom, Acting Director, Legal Services of Northern California (Nov. 1, 1994).
178. Telephone Interview with Bill Kennedy, Managing Attorney, Legal Services of Northern California (Feb. 20, 1996).
179. Telephone Interview with Janis Paular, Transcript Reimbursement Fund Coordinator, Court Reporters Board of California, State of California, Department of Consumer Affairs (Nov. 11, 1994); *See also* CAL. BUS. & PROF. CODE §8030.2 *et seq.*
180. Memorandum from Curtis M. Caton, *et al.*, Law Firm Pro Bono Project to Pro Bono Coordinators and Public Interest Law Groups (July 26, 1994) (on file with Office of Legal Services, State Bar of California); Telephone Interview with Tammy Taylor, Coordinator of Volunteer Services, American Bar Association (Feb. 13, 1996).

181. Memorandum from Nancy Strohl, *et al.*, to Access to Justice Working Group 15 (Sept. 13, 1993) (on file with the Office of Legal Services, State Bar of California).
182. *Id.* at 18-19.
183. Telephone Interview with Evelyn Riyhani, Director of Legal Programs, University of California at Irvine (Nov. 4, 1994).
184. Telephone Interview with Hector Vargas, Program Director, The National Association for Public Interest Law (Nov. 1, 1994).
185. Telephone Interview with David Stern, Executive Director, The National Association for Public Interest Law (Feb. 13, 1996).
186. Telephone Interview with Judith Garlow, Director, Legal Services Trust Fund Program, State Bar of California (Nov. 1, 1994).
187. See CLNS: LOW- AND MODERATE-INCOME, *supra* note 91, at Table 4-9, at 29.
188. Telephone Interview with Barbara Rudometkin, Director, Lawyer Referral Service, Santa Clara County Bar Association (Feb. 9, 1995).
189. LOREN RENZ AND STEVEN LAWRENCE, FOUNDATION GIVING (1994).
190. Extrapolated from Memorandum, July 13, 1994, on Legal Services Funding Figures, *supra* note 109.
191. Memorandum from Dan DeVries, *et al.*, National Center for Youth Law to IOLTA Funded Programs with San Francisco Offices (July 26, 1994) (on file with the Office of Legal Services, State Bar of California).

#### **Appendix One**

192. See CLNS: LOW-INCOME, *supra* note 91, at Table 4-1, at 19.
193. *Id.* at Table 4-11, at 32.
194. *Id.* at Table 4-3, at 21.
195. *Id.* at Table 5-2, at 43.
196. *Id.* at Table 5-8, at 52.
197. *Id.* at Table 5-12, at 56.
198. *Id.* at Table 5-21, at 66.

#### **Appendix Two**

199. The number of nonpoverty households (2,531,813) is derived by subtracting the number of poverty households (1,776,135) from the number of households that represent 41.41% of the state's population (4,307,948).
200. The analysis of unmet legal needs relies on CLNS: LOW- AND MODERATE-INCOME, *supra* note 91, at Tables 4-1 and 4-2, at 21-22; and AGENDA FOR ACCESS, *supra* note 91, at Table 3, at 6, and Table 6, at 8.

| <b>Most Formal Action Taken</b> | <b>Incidents</b> | <b>Satisfied</b> | <b>Dissatisfied</b> |
|---------------------------------|------------------|------------------|---------------------|
| Legal/Judicial                  | 39%<br>(888,667) | 64%<br>(568,747) | 28%<br>(248,827)    |
| Nonlegal/3rd Party              | 12%<br>(273,436) | 57%<br>(155,859) | 40%<br>(109,374)    |
| On Own                          | 23%<br>(524,085) | 50%<br>(262,043) | 45%<br>(235,838)    |
| Nothing                         | 26%<br>(592,444) | 39%<br>(231,053) | 46%<br>(272,524)    |

201. 937,656 is the total of 592,444 (no action taken, regardless of satisfaction with the outcome) + 235,838 (person's own action yielded unsatisfactory results) + 109,374 (nonlegal action or action by a nonlegal third party yielded unsatisfactory results).
202. 1,205,322 is the total of 237,112 (nonlegal action or third party action, regardless of satisfaction with outcome) + 454,466 (person's own action, regardless of satisfaction with outcome) + 513,744 (no action taken, regardless of satisfaction with outcome).

203. 1,389,965 is the total of 273,436 (nonlegal action or action by a nonlegal third party, regardless of satisfaction with outcome) + 524,085 (person's own action, regardless of satisfaction with outcome) + 592,444 (no action, regardless of satisfaction with outcome).

